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**ROMANIAN BUSINESS LAW\***

**INTRODUCTION**

Romania joined the European Union on January 1, 2007. Even prior to 2007, efforts were made to align the Romanian legislation to the European Union Directives and standards. The European Union Regulations are applicable in Romania as of the accession date. In case of conflicts between a European Directive or Regulation, and a Romanian law, the European Directive or Regulation will prevail.

The briefs on **Romanian Business Law** presented below provide concise information on selected business law topics updated from time to time.

Rather than an academic presentation of the Romanian legislation, the aim is to offer pragmatic orientation in a straightforward manner on doing business in Romania in the areas under review.

We recommend to take legal or tax advice, as the case may be, from a local lawyer in order to tailor the best solution for the proposed investment or transaction.

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**TABLE OF CONTENTS**

Introduction ..... i

Table of contents ..... ii

1. Romanian Corporate Vehicles ..... 1

2. Romanian Tax Laws ..... 8

3. Romanian Real Estate Laws ..... 27

4. Romanian Energy Laws ..... 34

    4.1 Romanian Electricity Trading Laws ..... 34

    4.2 Romanian Renewable Energy Laws ..... 42

5. Romanian Oil and Gas Laws ..... 49

6. Romanian Mining Laws ..... 57

7. Romanian Project Finance ..... 63

8. Romanian Capital Markets Laws ..... 66

9. Romanian Public Procurement Laws ..... 75

10. Romanian Competition Laws ..... 82

    10.1 Economic Concentration ..... 82

    10.2 State Aid ..... 87

11. Romanian Labour Laws ..... 91

12. Romanian Data Protection Laws ..... 97

13. Supplementary Protection Certificate (drug patent) ..... 103

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## **1. ROMANIAN CORPORATE VEHICLES**

*Updated May 2016*

The relevant **Romanian corporate laws and regulations** are:

- ✓ Company Law no. 31 of 1990 as amended
- ✓ Law no. 26 of 1990 regarding the Trade Registry
- ✓ Methodological Norms of 2008 regarding the application of Law no. 26 of 1990 regarding the Trade Registry
- ✓ Decree-Law no. 122 of 1990 regarding the Authorization and Operations of the Representative Offices of Foreign Companies
- ✓ Romanian Civil Code

The following vehicles are regulated under Romanian law:

1. joint stock company;
2. limited liability company;
3. general partnership;
4. limited liability partnership.

In addition to the above-mentioned vehicles, which have legal personality, the branches (which are mere extension of the parent company) and the Representative Offices are also regulated by law.

Also, a person carrying out personally a particular trade may register with the Trade Registry and the relevant tax authority as a Registered Physical Person.

The legal vehicles mostly used by the investors in Romania are the limited liability company (LLC), joint stock company (JSC), the branch, and the Representative Office.

The LLC is the favorite vehicle used by foreign investors.

The JSC is seldom chosen by foreign investors as an initial investment vehicle. However, in many cases foreign investors are acquiring participations in Romanian companies which were initially incorporated as joint stock companies.

The Representative Offices can be used only for advertising, marketing, and liaison purposes.

The Trade Registry is the authority of registration of the Romanian companies. Any third party may obtain upon request certified copies of the corporate records of a Romanian company which are on file at the Trade Registry.

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Below you will find a comparative presentation of the above legal vehicles used by foreign investors in Romania. We will address below such issues as legal status, object of activity, approvals for registration, taxation and financial reporting, and differences between an LLC, and a JSC.

### **Legal status**

- i. Representative Office: it is not a legal person - it is a mere extension of the parent company;
- ii. Branch: it is not a legal person - it is a mere extension of the parent company;
- iii. LLC - it is a Romanian legal person;
- iv. JSC - it is a Romanian legal person.

### **Object of activity**

#### *a. Representative Office*

The object of activity of the Representative Office is limited to the promotion and marketing operations conducted in the name of the parent company.

A Representative Office of a foreign company can represent in Romania one or more foreign companies.

The Representative Office is allowed to derive income only in the form of fees for the services rendered received from abroad from the foreign companies it represents in Romania. Therefore, the Representative Office cannot receive fees from Romanian legal entities or natural persons.

#### *b. Branch*

The object of activity of a branch cannot go beyond the scope of activities provided for in the By-laws of the parent company.

#### *c. LLC and JSC*

The object of activity of an LLC or JSC is not restricted to that of its foreign parent company.

The object of activity must be described in the Constitutive Act of the company filed with the Trade Registry.

### **Approvals for registration**

#### *a. Representative Office*

A permit for the establishment of a Representative Office must be obtained from the Ministry of Small and Medium Enterprises. The annual authorization fee is of USD 1,200. The permit is renewable annually.

The Representative Office must also register with the Chamber of Trade and Industry and with the tax authority.

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The completion of the registration procedure would take about 30 days from the date of the filing the application.

*b. Branch*

The branch must be registered with the Trade Registry and with the fiscal authority.

*c. LLC and JSC*

An LLC or a JSC must be registered with the Trade Registry and with the tax authority.

According to the law, the registration procedure would take approximately 3 – 5 days from date of the filing of the application.

There are no restrictions on the number or nature of directors of a JSC or an LLC.

There are no mandatory employee rights of representation in the management structures of a JSC or LLC.

**Differences between an LLC and a JSC**

The liability of the shareholders of an LLC or a JSC is limited to their investments in the company, i.e. to their shares.

However, as noted below, there are some significant differences between a joint stock company and a limited liability company.

*a. LLC*

An LLC can have as few as one shareholder, but the number of the shareholders cannot exceed fifty.

It cannot be set up by public subscription.

The share capital of an LLC cannot be lower than 200 Lei, and must be divided into equal shares which must have a value of no less than 10 Lei. The shares of an LLC are not negotiable instruments.

Each share gives the right to one vote in the general meeting of the shareholders.

The shares can be transferred between the shareholders. The transfer to outsiders is allowed only if approved by shareholders representing at least three fourths (3/4) of the registered share capital.

An LLC cannot issue bonds.

The general meetings of the shareholders must convene at least once a year or whenever it is necessary.

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The law does not distinguish between an ordinary and an extraordinary general meeting. The general meeting decides by a vote representing the absolute majority of the shareholders and shares, if the Constitutive Act does not provide otherwise.

The vote of all shareholders is required for the amendment of the Constitutive Act, if the Constitutive Act does not provide otherwise.

The LLC is managed by one or more Administrators, who may be or not shareholders. Initially, the Administrators must be appointed by the Constitutive Act.

The appointment of statutory auditors is not required if the number of shareholders is less than 15.

*b. JSC*

A JSC must have at least two (2) shareholders.

It may be established by private subscription or by public subscription.

The minimum share capital is 90,000 Lei.

Shares can be issued in the bearer form or in nominative form. The nominative shares can be converted into bearer shares. The nominative shares may be issued in a material form (on paper support) or in a dematerialized form (by electronic account recording). In the case of the nominative shares issued in a material form, individual or cumulative share certificates can be issued.

The nominal (par) value of a share cannot be less than 0.1 Lei.

Preferred shares may be issued. Such shares confer the following rights:

- i. the right to a priority dividend; and
- ii. the rights recognized to the owners of common shares, except for the right to vote at the general meeting of the shareholders.

The preferred shares cannot be in excess of one fourth of the share capital and must have the same nominal value as the common shares. The preferred shares and the common shares can be converted from one class to another if approved by a decision of the general meeting of the shareholders.

The law does not impose any restrictions regarding the transfer of shares in a JSC. Nevertheless, certain restrictions, e.g. right of first refusal, can be provided by the shareholders in the documents of incorporation of the company.

A JSC may buy back up to 10% of its own shares. The voting rights and the rights to dividends are suspended during the period in which the shares are held by the company.

A JSC may raise capital by issuing bonds.

The contributions to the share capital can be in cash and in-kind. The contributions in cash are mandatory but the law does not indicate a minimum amount. At least 30% of the share capital

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subscribed by each shareholder must be paid upon the formation of the company, and the remaining 70% within a period of twelve months in the case of cash contributions, and two years in the case of in-kind contributions.

The share capital can be increased either by the issuance of new shares or by the increase of the nominal value of the existing shares against the payment of new contributions in cash or in-kind.

In the case of an increase in the share capital the existing shareholders have a preemption right to subscribe the newly issued shares *pro rata* to their shareholding in the company.

The general meetings of the shareholders can be ordinary and extraordinary.

An ordinary general meeting of the shareholders of the company must be called at least once a year, within a maximum of five months from the end of the fiscal year.

In order to have valid proceedings for an ordinary meeting the presence of the shareholders representing at least a quarter of the voting rights is required. Resolutions are valid if taken by the votes of the shareholders holding the majority of the voting rights present at the meeting. The Constitutive Act of the company may provide higher quorum and voting majorities for the ordinary meeting.

The call notice may provide the date and the time for a second meeting, in case that the quorum for the first meeting is not met.

In order to have valid proceedings for an extraordinary meeting, the presence of the shareholders representing at least a quarter of the voting rights is required. If this quorum is not met, at the following meetings the quorum required is of one fifth of the voting rights. Resolutions are valid if taken by the votes of the shareholders holding the majority of the voting rights present at the meeting. The Constitutive Act of the company may provide higher quorum and voting majorities for the extraordinary meetings.

The law provides for two types of management structures that can be used in a JSC: the Administrator - based system, and the dual system.

*a. The Administrator - based system*

The JSC is managed by a Council of Administration although it is possible to have only one Administrator. The Council of Administration is elected by the General Meeting of the Shareholders. The President of the Council of Administration can also be the General Manager of the company. The Council of Administrators meets whenever it is necessary but at least once a month.

The performance of the operations of the company can be delegated to one or several executive managers, who are employees of the company and cannot be members of the Council of Administrators.

*b. The dual system*

The JSC is managed by a Board of Directors, which is appointed by a Supervisory Board.

The shareholders appoint the Supervisory Board. At the time of the registration of the company the members of the Supervisory Board must be appointed by the Constitutive Act.

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The Supervisory Board should have a minimum of 3 and a maximum of 11 members. They may be revoked by a majority vote of 2/3 of the shareholders attending the General Meeting of the Shareholders.

The members of the Supervisory Board cannot be at the same time employees of the company.

The members of the Supervisory Board can be either natural or legal persons.

The Supervisory Board has the following attributions:

- (i) it exercises the permanent control of the management of the company by the Board of Directors;
- (ii) it appoints and revokes the members of the Board of Directors;
- (iii) it verifies the conformity of the management of the company with the law, the Constitutive Act, and with the decisions of the General Meeting;
- (iv) it submits an activity report at least once a year to the General Meeting of the Shareholders.

The establishment of an audit committee within the Supervisory Board is mandatory in the case of the joint stock companies, which have the legal obligation to have their annual balance sheet audited.

The Board of Directors exercises its duties under the supervision of the Supervisory Board.

The management of the company shall be ensured exclusively by the Board of Directors which must take all necessary actions for the achievement of the scope of activity, except for those reserved to the General Meeting of the Shareholders, and to the Supervisory Board.

The Constitutive Act may provide for certain actions to be taken by the Board of Directors only with the approval of the Supervisory Board. In case the Supervisory Board does not give its consent in respect thereof, the Board of Directors may request the approval of the General Meeting of the Shareholders, approval which must be granted by the vote of 3/4 of the attending shareholders.

A person cannot be member of the Supervisory Board, and of the Board of Directors at the same time.

The Board of Directors must submit to the Supervisory Board, at least once every three months, a report regarding the management of the company and possible developments. The Board of Directors also must report to the Supervisory Board any information regarding the events, which may have a significant impact on the company's operations.

A JSC must have three statutory auditors and one substitute auditor.

If certain conditions are met a JSC may use the European Accounting Standards. In such case, the JSC must have one internal auditor and one outside auditor.

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## **Liability of Administrators/Directors**

The Administrators of a JSC or LLC are jointly liable towards the company for failing to take actions required by law in order to obtain payments from the shareholders which have not paid in full the subscription price for their shares, for the legality of paid dividends, for the maintenance and safekeeping of books and records of the company required by law, for the execution of the decisions of the general meeting of the shareholders and for the strict compliance with the obligations imposed by law and the Constitutive Act of the company.

Also, the Administrators and/or Directors acting in breach of their duties are liable for the respective damages caused to the company.

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## 2. ROMANIAN TAX LAWS

*Updated January 2018*

The relevant **Romanian tax laws** are:

- ✓ Fiscal Code approved by Law no. 227/2015 ("**Fiscal Code**"), as amended
- ✓ Fiscal Procedure Code, approved by Law no. 207/2015, as amended
- ✓ Order no. 222 of 2008 of the President of the National Agency for Tax Administration regarding the Transfer Pricing Documentation ("**Order no. 222**")
- ✓ OECD Transfer Pricing Guidelines

### **Corporate profit tax**

#### *Applicability*

The revenues of the following entities are subject to corporate profit tax:

- (i) companies tax resident in Romania;
- (ii) foreign companies doing business in Romania through permanent establishments;
- (iii) foreign companies which obtain revenues from or in connection with real estate transactions or from share transactions in Romanian companies;
- (iv) foreign companies and non-resident individuals doing business in Romania through partnerships with or without legal personality;
- (v) resident individuals who form partnerships without legal personality with Romanian companies, for revenues obtained in or outside Romania;
- (vi) companies having their registered office in Romania, established according to the European legislation.

A company is considered resident if its head office is registered in Romania or has its effective place of management in Romania.

#### *Corporate Profit Tax Rate*

The standard corporate profit tax rate is of 16%.

#### *Calculation of the Taxable Profit*

This is calculated as the difference between the revenues obtained from any source and the expenses incurred in obtaining taxable revenues throughout the fiscal year, adjusted by deducting non-taxable revenues and adding non-deductible expenses. When calculating the taxable profit, the elements similar to revenues and expenses are also taken into account.

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The fiscal year is considered to be the calendar year or the period during which the entity existed, if it was established or dissolved during that calendar year.

#### *Non-taxable revenues*

The Fiscal Code provides for several non-taxable revenues such as:

- (i) Revenues resulting from dividends received by a Romanian company from another Romanian company.
- (ii) Revenues resulting from dividends received by a Romanian company from a subsidiary located in an EU member state, subject to the following conditions:
  - (a) the Romanian company is a registered profit taxpayer; and
  - (b) the Romanian company has held at least 10% of the subsidiary's shares for a continuous period of at least one year until the date the dividends are paid.
- (iii) Revenues resulting from the cancellation of provisions or expenses that were previously non-deductible, revenues resulting from the recovery of expenses that were previously non-deductible and revenues resulting from reversal or cancellation of interest and late-payment penalties that were previously non-deductible.
- (iv) Revenues obtained from the sale of shareholding participations held in (a) Romanian companies or in (b) foreign companies located in a state with which Romania has concluded a double taxation convention, if, at the date of the sale, the taxpayer has held for a continuous period of at least one year at least 10% of shares of the company of which the shareholding participations are sold. This exemption does not apply if the taxpayer who sells shareholding participations in a Romanian company is resident in a state with which Romania did not sign a double taxation convention.
- (v) Non-taxable income expressly provided under agreements and memoranda approved through legal enactments.

#### *Deductibility of the expenses*

There are three categories of expenses:

- (i) deductible expenses;
- (ii) limited deductibility expenses;
- (iii) non-deductible expenses.

#### *Deductible expenses*

The expenses are deductible only if incurred for the purpose of generating taxable income.

Deductible expenses may be:

- (i) expenses incurred with professional training and development of employees;

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- (ii) advertising expenses incurred with promoting the company, products or services, based on written agreements, as well as costs related to the production of the materials required for broadcasting advertisements, including goods granted as samples, with product testing at selling units, as well as other goods and services received in order to stimulate sales;
- (iii) expenses incurred with marketing, market research, promotion on existing or new markets, participation in fairs and exhibitions, in business missions and with publishing of own brochures;
- (iv) expenses incurred with environmental protection and resource preservation;
- (v) expenses incurred with the improvement of management, IT, the introduction, maintenance and development of quality management systems, and with obtaining quality compliance confirmation;
- (vi) travel and accommodation expenses related to business trips in Romania or abroad by employees and directors;
- (vii) expenses incurred in relation to work safety, prevention of work accidents and occupational diseases, the related insurance contributions and professional risk insurance premiums.

*Non-deductible expenses*

The Fiscal Code provides for certain non-deductible expenses, such as:

- (i) domestic profit tax and profit tax paid in foreign countries;
- (ii) expenses related to non-taxable revenues;
- (iii) expenses related to withholding tax borne by Romanian taxpayers on behalf of non - residents;
- (iv) interest, fines and penalties due to Romanian or foreign authorities;
- (v) expenses incurred with the management, consultancy, assistance or other services if no related agreements were concluded and the beneficiary cannot justify the supply of such services for the activities performed or for their necessity;
- (vi) sponsorship and patronage expenses and expenses for private scholarships. However, the taxpayers are granted a fiscal credit up to an amount consisting of the lowest value between 0.5% of the turnover and 20% of the due profit tax;
- (vii) expenses recorded without justifying documentation;
- (viii) salary expenses which are not taxed at the level of the individual;
- (ix) expenses made in favour of the shareholders, other than the ones related to goods or services provided by the shareholders at the market value;

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- (x) 50% of the fuel expenses for company vehicles weighing under 3,500 kg and with less than nine passenger seats including the driver's seat; the Fiscal Code though provides that in certain cases the fuel expenses are fully deductible.

#### *Limited deductibility expenses*

Certain expenses have limited deductibility, such as:

- (i) depreciation of assets under the regulations related to the fiscal depreciation;
- (ii) perishable goods within the limits established by the relevant central administration bodies;
- (iii) protocol expenses are deductible up to the limit of 2% of the accounting profit, to which the protocol and profit tax expenses are added; the collected VAT related to gifts offered by taxpayers, of which value is higher than Lei 100, is included in the protocol expenses;
- (iv) daily allowances for expenses from domestic and foreign travel by employees are deductible up to the level of 2.5 times the legal threshold established for public institutions;
- (v) taxes and contributions paid to non-government organizations and professional associations related to the taxpayer's activity are deductible up to the limit of EUR 4,000 per year;
- (vi) health insurance premiums are deductible up to the limit of EUR 250 per year, per employee;
- (vii) private pension insurance premiums are deductible up to the limit of EUR 400 per year, per person.

#### *Provisions and reserves*

As a general rule, the provisions and reserves are non-deductible for profit-tax purposes.

However, the Fiscal Code provides for certain provisions and reserves which can be considered deductible.

#### *Accounting and fiscal depreciation*

The Fiscal Code establishes a distinction between accounting and fiscal depreciation.

With regard to the fixed assets, the fiscal depreciation is calculated according to the provisions of the Fiscal Code. Therefore, the deductibility level of the expenses related to the depreciation of the fixed assets does not depend on the level of depreciation recorded in the accounts.

The calculation of the depreciation of fixed assets for tax purposes is based on the tax value.

The said depreciation may need to be adjusted for revaluations according to the accounting rules.

The fiscal depreciation should be calculated based on the asset's tax value and useful life for tax purposes, by applying one of the allowed depreciation methods:

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- (i) straight-line method;
- (ii) accelerated depreciation method; and
- (iii) reducing balance method.

The Fiscal Code provides an incentive for the purchase of machinery and equipment, computers and their peripherals, as well as patents. These can be depreciated by using the accelerated method which consists of the deduction of a maximum of 50% of the asset's tax value during the first year of usage. The rest of the asset's value can be depreciated using the straight-line method over the remaining useful life.

#### *Filing the tax returns and payment of tax*

The profit tax returns are filed and profit tax is usually paid on a quarterly basis.

Non-resident companies obtaining incomes from real estate property located in Romania or sale of shares held in a Romanian company are obliged to declare and pay the related profit tax. For this purpose, such companies may appoint a tax representative or an authorized person to fulfil this requirement. However, if the buyer is a Romanian company or a Romanian permanent establishment of a non-resident company, the obligation to declare and pay the said profit tax will remain with the buyer.

Taxpayers, with certain exceptions, may opt for computing, declaring and paying the annual profit tax in quarterly advance payments.

#### *Loss carried forward*

The annual loss, as established by the profit tax return, is to be recovered from the taxable profits obtained during the following seven consecutive years.

#### *The fiscal regime of the transfers of assets, fiscal residence and/or economic activity carried out through a permanent establishment which are not subject to taxation in Romania*

For the transfers of assets, fiscal residence and/or economic activity carried out through a permanent establishment, the taxpayer is subject to tax on profit, which is declared and paid, for the reference fiscal period.

The taxpayer benefits from the right to reschedule the payment of this tax, by paying it in installments during a five-year period, if the conditions provided by the tax legislation are complied with.

#### *Tax exemption for reinvested profit*

The reinvested profit is the balance of the profit and loss account, i.e. the accounting gross profit cumulated starting with the beginning of the year. Such reinvested profit, if used for the purchase of equipment will be tax exempt. This exemption will be applicable for the year when the respective equipment is put into use.

The tax exemption for reinvested profit is applicable in case of equipment manufactured and/or purchased as of July 1st, 2014 and put into use until December 31, 2016.

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The taxpayers which benefit from this tax exemption must retain the equipment in their patrimony for a minimum period equal to half of the commercial life of the equipment. There are certain exceptions to this rule, i.e. the equipment is destroyed, lost, stolen or sold during the insolvency procedure. This retention period cannot exceed 5 years.

Furthermore, the taxpayers which benefit from this tax exemption may not use the accelerated depreciation method for the relevant equipment.

### **Transfer pricing**

Transactions with Romanian affiliated companies as well as transactions with non-resident related parties are subject to audits regarding the compliance with transfer pricing legislation.

When auditing such transactions, the tax authorities may adjust the amount of income or expense of either person as necessary in order to reflect the market price for the goods or services provided in the transaction.

The methods that may be used for setting transfer prices are provided by the OECD Transfer Pricing Guidelines. The Romanian audit authorities also refer to local precedents, and interpretation of relevant Romanian laws.

The taxpayers which perform such transactions must prepare their transfer pricing documentation and make the file available upon the written request of the Romanian tax authorities.

The content of the transfer pricing documentation file was approved by Order no. 222.

The said Order is supplemented by the Transfer Pricing Guidelines issued by the OECD Transfer Pricing Guidelines and the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (“**EUTDP**”).

The deadline for submitting the transfer pricing documentation file must not exceed three months. However, a single extension equal to the period initially established is possible.

Failure to submit the transfer pricing documentation file or the submission of an incomplete file following two consecutive requests will trigger the assessment of the transfer prices by the tax authorities.

### **Foreign fiscal credit**

Romanian companies are granted a fiscal credit for income taxes paid abroad which cannot exceed the profit tax calculated by applying the Romanian profit rate of 16% to the taxable profit obtained abroad.

In this respect, the Romanian company is required to have on file the documentation attesting the payment of taxes abroad.

Fiscal credits may be obtained in Romania for taxes paid to a foreign state only if the Double Taxation Conventions concluded between Romania and the respective state apply, and based on the documentation which proves that the taxes were paid in the foreign state.

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## **Dividend tax, payable by resident companies**

Dividend payments made by a Romanian company to a Romanian resident shareholder, or to a non-resident shareholder, are subject to 5% dividend tax.

Dividends paid by Romanian companies/companies having their registered office in Romania, incorporated according to the European regulations to other such companies are tax exempt if the beneficiary of the dividends holds a minimum of 10% of the shares in the other company for an uninterrupted period of at least one year before the date of the payment.

Dividends paid by a Romanian company or a company that has its registered office in Romania, to a company or a permanent establishment of a company resident in an EU member state are tax exempt if the non-resident company which benefits from the dividends:

- (i) is set up according to Art. 20<sup>1</sup> (4) of the Romanian Fiscal Code;
- (ii) is a resident of the respective state and, based on a Double Tax Convention concluded between the respective state and a non-EU state, the said company is not considered to be a resident with the purpose of taxation outside EU;
- (iii) pays profit or a similar tax in their state of residency;
- (iv) owns a minimum of 10% of the shares in the Romanian company.

Interest and royalty payments by Romanian companies to other Romanian companies are not subject to withholding tax but are considered as taxable income for the beneficiary and are subject to ordinary corporate profit tax.

In case that the amount of the dividends received is higher than 12 minimum wages, the taxpayer must pay health insurance contribution.

## **Consolidation**

There is no tax consolidation in Romania between entities which have a distinct legal personality. Starting with July 1<sup>st</sup> 2013, the Romanian tax law allows corporate income tax consolidation between all of the permanent establishments, i.e. management offices, branches, plants, stores, mines, and oil and gas wells operated in Romania by a foreign legal entity, but no change was made with regard to the tax consolidation of entities with distinct legal personality, e.g. subsidiaries.

## **Capital Gains obtained by residents**

Capital gains obtained by Romanian resident companies are taxed at 10%.

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.

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## **Corporate Tax payable by branches and representative offices of non-residents**

### *General issues*

Non - resident foreign legal entities are generally subject to Romanian taxation for the revenues sourced in Romania.

Non - resident foreign entities become subject to Romanian taxation by establishing (i) a branch, (ii) a representative office, or (iii) a permanent establishment. Also, they have to pay withholding tax on the Romania's sourced income.

### *Branch*

The branch is a mere extension of the parent company; it does not have a legal personality. The activities of the branch are controlled and limited by the decisions of the parent company. Given the lack of the legal personality, the branch itself cannot be a party to a contract. The contract can be concluded by the parent company – acting through its branch, or directly by the parent company.

In terms of taxation, there are no major differences between the branch and the subsidiary, i.e. a company registered as a Romanian legal person. From the tax perspective, a branch of a foreign company is considered a taxpayer in Romania, given that the branch can qualify as a permanent establishment according to the provisions of the Romanian Fiscal Code.

The first step of the tax registration is performed at the same time with the registration with the Trade Registry, by filing a Fiscal Registration Form with the Trade Registry.

After the registration of the subsidiary/branch with the Trade Registry, the second step of the tax registration can be carried out, i.e. the issuance by the relevant tax authority of the Tax Registration Certificate, or the VAT Registration Certificate (if the branch will be registered as a Romanian VAT payer). Such formality is usually carried out by the accountants of the newly registered branch.

The branches must be registered with the Trade Registry and with the Romanian tax authorities.

The distribution of funds to the non-resident parent company is not regarded as dividend distribution, therefore, no withholding tax liability arises.

### *Representative Office*

A Representative Office can only perform auxiliary or preparatory activities. It cannot perform trading activities in its own name and cannot engage in any commercial activities. There is a flat tax of EUR 4,000 per year for representative offices, payable in two equal instalments, and a tax of EUR 1,200 per year for the renewal of the authorization.

If a Representative Office is set up or dissolved during the year, the tax due for the respective year is pro-rated for the months when the Representative Office is operational.

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### *Permanent establishment (“PE”)*

A Permanent Establishment refers to a taxable presence of a non-resident in Romania. A PE is a place where the activity of a non-resident is conducted, fully or partially, directly or through a dependent agent. The Fiscal Code includes in this category the following:

- (i) a place of management;
- (ii) a branch;
- (ii) an office;
- (iv) a factory;
- (v) a shop;
- (vi) a workshop;
- (vii) a mine;
- (viii) an oil or gas well;
- (ix) a quarry or other places of extraction of natural resources;
- (x) the location where a certain activity involving the assets and liabilities of a Romanian legal entity entering into reorganization continues to be performed.

The profit derived from the activity performed of the PE is subject to profit tax.

### *Withholding Tax (“WHT”)*

Non-resident companies which are not operating through a PE are subject to tax in Romania for the income from Romanian-based sources. The WHT covered by the Double Tax Conventions to which Romania is a party range from 0 %, to 15 %.

WHT is applicable to the following revenues:

- (i) commissions;
- (ii) revenues from services rendered in Romania;
- (iii) revenues resulted from the liquidation of a Romanian legal entity.

If there is no applicable Double Tax Convention, the revenues of the respective non-resident sourced from Romania are taxed at the rate of 10%.

There are certain exceptions to the above rate, such as:

- (i) dividends - dividends paid by Romanian companies to payees residing in one of the EU countries are exempt from WHT, if the dividend beneficiary:
  - a. is set up according to Art. 20<sup>1</sup> (4) of the Romanian Fiscal Code;

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- b. is a resident of the respective EU state, and based on a Double Tax Convention concluded between the respective EU state and a non-EU state, the said company is not considered to be a resident of the EU state for the purpose of taxation outside EU;
  - c. pays profit or a similar tax in its state of residence;
  - d. owns a minimum of 10% of the shares in the Romanian company.
- (ii) interest and royalties - interest and royalties payments are exempted from WHT if the beneficiary is (1) a company resident in another member state, or (2) a PE of a company resident in a member state, located in another member state.
  - (iii) gambling - the applicable WHT rate is of 25%.
  - (iv) revenues paid in a state with which Romania did not conclude any legal agreements providing an exchange of information between the states, i.e. revenues paid in fiscal paradises – as of February 1<sup>st</sup>, 2013, the applicable WHT rate is of 50%.

In order to apply the favourable European legislation, non-residents must submit a tax residence certificate and must issue a declaration attesting the compliance with the requirements provided by the European Directives.

As of June 1<sup>st</sup>, 2015, non-resident taxpayers which earn interest income in Romania may opt to apply the tax treatment provided for resident taxpayers.

Thus, non-resident taxpayers may opt to register for profit tax purposes in Romania, directly or through a tax agent. The option is available for non-resident legal entities which reside in the European Union or in the European Economic Area member states which concluded Double Tax Conventions or Information Exchange Agreements with Romania.

#### *Capital Gains obtained by non-residents*

Capital gains obtained by non-residents from the sale of real estate located in Romania or from the sale of shares held in Romanian companies are taxable in Romania at a rate of 10%. However, Double Tax Conventions may provide more favourable rates.

#### *Double Tax Conventions*

Double Tax Conventions concluded between Romania and the country of residence of the payment beneficiary may provide different WHT rates.

The list of countries with which Romania concluded Double Tax Conventions is found at [http://static.anaf.ro/static/10/Anaf/AsistentContribuabili\\_r/Conventii/Conventii.htm](http://static.anaf.ro/static/10/Anaf/AsistentContribuabili_r/Conventii/Conventii.htm).

In order to avoid withholding, the non-resident recipient has to provide the resident payer with a valid tax residence certificate prior to the payment of the income. The tax residence certificate should stipulate that the foreign beneficiary was a tax resident in a country other than Romania, during the period when the Romanian income was obtained.

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The tax residence certificate valid for the year for which the payments are made is also valid during the first 60 days of the following year if the residency conditions did not change.

The WHT rates provided by the Romanian Fiscal Code will apply if a tax residence certificate is not available. However, a refund can be requested if the tax residence certificate is submitted during a 5-year period following the receipt of income from a Romanian resident.

### **Special provisions**

When establishing the amount of a tax or of a charge according to the provisions of this Fiscal Code, the tax authorities may not take into account a transaction which does not have an economic purpose or may reclassify the form of a transaction in order to reflect the economic content of the transaction. In case the transactions or a series of transactions are qualified as being artificial, provisions of the relevant Double Tax Treaty will not apply, and the transactions in question will be taxed according to the Romanian Fiscal Code. Artificial transactions are the transactions or series of transactions which do not have an economic content and which cannot be normally used within regular economic practices, the essential purpose thereof being to avoid taxation or to obtain tax advantages which could not be granted otherwise.

### **Local Taxes and Other Taxes**

The Fiscal Code provides certain local taxes, such as:

- (i) building tax;
- (ii) land tax;
- (iii) tax on means of transport;
- (iv) tax related to promotion and advertising;
- (v) taxes for the issuance of certain certificates, licenses and authorizations;
- (vi) tax on revenues obtained from public performances.

#### *Building Tax*

For buildings owned by companies, the building tax rate is established by the Local Council at a rate between 0.25% to 1.5% of the registration value of the building, adjusted, by case, with the value of reconstruction, consolidation, modernization, modification and extension works.

If the building has not been reassessed in the previous 3 (three) years, the tax rate is increased by the Local Council by 5% to 10%. The taxable value of fully depreciated buildings is reduced by 15%.

The building tax is due twice a year, by March 31, and September 30, and is paid in equal instalments.

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### *Land Tax*

Owners of land must pay a land tax per square meter, according to the classification established by the municipality where the land is located, and the zoning of the area where the land is located. The zoning is determined by the local municipality.

The land tax is due twice a year, by 31 March, and by 30 September, and is paid in equal instalments.

### **Registration of the agreements concluded between non-residents and Romanian entities, and natural persons regarding certain services rendered in Romania**

According to Order no. 2310 of 2007, the Romanian legal and natural persons have the obligation to register the agreements concluded with foreign legal entities or non-resident natural persons which render on the Romanian territory services like: construction works, installation works, surveillance works, consultancy works, technical assistance works and any other activities which may be considered a permanent establishment in Romania.

These agreements must be registered with the territorial tax authorities in the jurisdiction in which the Romanian legal entities benefitting of the above-mentioned activities have their fiscal domicile, or, in the case of medium-sized and large taxpayers, with the competent tax authority.

### **Contributions to the Social Security System**

Under the Romanian employment and tax regulations, certain contributions must be paid to the social security system. The basis for the calculation of social security contributions is the gross salary received by the employees or the assimilated compensation thereof.

The social insurance contributions are:

- (i) 25% for normal working conditions, which is payable by the employees, or persons assimilated to them;
- (ii) 4% for extraordinary working conditions, which is payable by employers or persons assimilated to them;
- (iii) 8% for special working conditions, which is payable by employers or persons assimilated to them.

Employers have the obligation to calculate and withhold the social insurance contribution owed by the employees, or persons who receive incomes assimilated to salaries.

The contributions must be paid by the 25<sup>th</sup> day of the month following the month for which income is paid, or until the 25<sup>th</sup> day of the month following the quarter for which is the payment is due.

The social insurance contribution owed by the individuals who obtain income from salaries or assimilated to salaries, on the basis of a full-time, or part-time employment agreement, with certain exceptions, may not be less than the level of the social insurance contribution calculated with regard to the minimum national gross basic salary for the month for which the social insurance contribution is due.

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### *Social health insurance contributions*

The social health insurance contributions is of 10% of the gross salary, and is payable by employees or persons assimilated to them.

Persons, and legal entities who have the capacity of employers or are assimilated to them have the obligation to calculate and to withhold the social health insurance contribution due by the individuals who receive incomes from salaries or revenues assimilated to salaries.

The social health insurance contribution must be paid until the 25<sup>th</sup> day of the month following the month for which income is paid, or until the 25<sup>th</sup> day of the month following the quarter for which the payment is due.

The social health insurance contribution owed by the individuals who obtain income from salaries or assimilated to salaries, on the basis of a full-time or part-time individual employment agreement, with certain exceptions, may not be less than the level of the social health insurance contribution calculated with regard to the minimum national gross basic salary.

### *Contribution to the Health Fund by foreign individuals*

Citizens of the European Economic Area (“**EEA**”) countries and Switzerland benefit from coverage of medical expenses incurred in Romania, as well as from exemption from the social security contributions. Such exemptions are granted if the expats obtain the A1 certificate from another EU Member state where their employer is located or the E101 certificate from Norway, Iceland, Liechtenstein, and Switzerland for expats whose employers are located in these states.

If an individual is not subject to social contributions in his/her home country, that person will be subject to the jurisdiction of the Romanian social security system and will be liable to pay social security contributions due under Romanian regulations.

### *Work insurance contributions*

The taxpayers obliged to pay work insurance contribution for Romanian citizens, citizens of other states or for stateless persons, employed during the period when their domicile or residence is in Romania, are the employers or persons assimilated to employers.

The work insurance contribution is of 2,25% of the gross earnings from salaries and incomes assimilated to salaries in Romania and abroad.

The contribution must be paid by the 25<sup>th</sup> day of the month following the month for which the gross salary, or income assimilated to salary is paid, or by the 25<sup>th</sup> of the month following the quarter for which the payment is due.

## **Value Added Tax (“VAT”)**

### *General issues*

According to the Romanian legislation, before undertaking any economic activities involving VAT taxable and/or exempted transactions, such as supply of goods or services, any taxpayer whose economic activity is based in Romania, or has the centre of its activity outside Romania, but has a fixed establishment in Romania, must register with the competent tax authorities for VAT

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purposes. However, the Fiscal Code provides that companies which estimate that their annual turnover will be lower than the threshold provided by law may opt not to register for VAT purposes.

The annual turnover threshold for VAT registration is Lei 220,000, i.e. EUR 65,000. However, if within the fiscal year, the turnover of the taxpayer becomes higher than the said amount, the taxable person will have to register for VAT purposes with the competent tax authorities.

Depending on the resident status, the taxpayers may opt for:

1. standard VAT registration applicable to companies registered in Romania;
2. special VAT registration of Romanian companies for intra-community (European Union) acquisitions;
3. non-resident EU registered entities, or non-EU entities operating in Romania may appoint a fiscal representative and register for VAT purposes;
4. direct VAT registration in case of EU resident taxpayers.

A Romanian company may be required to register for VAT purposes in other EU Member States where it performs operations such as intra - EU community acquisition of goods, or holding a stock of goods.

From the VAT perspective, the economic activities of any entity carried out in an independent manner, irrespective of the purpose or result of those activities, is subject to VAT.

#### *VAT establishment*

A taxpayer is considered to be a resident of Romania if it registered its main business place in Romania, or it has a fixed establishment in Romania.

A taxpayer with its main place of business outside Romania has a fixed establishment in Romania if it has sufficient technical and human resources in order to perform taxable deliveries of goods and/or services on a regular basis.

#### *Transfer of business*

Any type of partial or total transfer of assets such as the transfer of a going concern is not subject to VAT if the beneficiary is a taxpayer. In order for a partial transfer of assets to be exempt from VAT, the transferred assets must constitute an autonomous business unit capable of autonomous economic activity.

#### *VAT territoriality*

The rules for establishing the place of supply of goods and services i.e. the place of VAT levy, are in line with the EU VAT Directives.

The supply of natural gas, electricity, and thermal energy is subject to VAT where the trader has its main business place or, in the case of supplies to an end customer, the place where they are used and consumed.

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### *Services provided by non-resident entities*

Services provided by *non-resident* entities to Romanian companies with the place of supply in Romania are subject to Romanian VAT.

For services provided by taxpayers to other taxpayers, the place of taxation is the place where the beneficiary established its business place, or it has a fixed establishment, domicile or habitual residence.

The Fiscal Code provides various exceptions from the above rules regarding VAT applicability in case of non-residents regarding certain services such as (i) transport related auxiliary services, (ii) works involving movable tangible goods, (iii) valuation of movable tangible goods, and (iv) local transport of goods. If such services are rendered to a non-EU resident taxpayer and the effective use of the services takes place in Romania, then the place of taxation is considered to be Romania.

### *The VAT quota*

The standard VAT quota currently applied in Romania is of 19% of the taxable base. The taxable base in respect of the VAT is the value of the delivery of a commodity, the value of the services rendered, the value of a taxable import, or the value of an intra-EU Community acquisition, as defined by the Fiscal Code.

The reduced VAT quota of 9% is levied on medicines for human and veterinarian use, books, newspapers and periodicals, accommodation in hotels or in establishments with a similar function, cinema tickets, admission fees at museums, historical monuments, zoos and botanical gardens, fairs and exhibitions, supply of school manuals, supply of prostheses and orthopaedic products, restaurant and catering services, excluding alcoholic beverages, most of the food and beverage products (excluding alcoholic beverages) intended for human and animal consumption, such as live domestic animals and poultry, seeds, plants and ingredients used in preparing food, certain food supplements or substitutes.

The reduced VAT quota of 5% applies to housing delivered as part of an approved welfare scheme, including: old people's homes, retirement homes, orphanages, rehabilitation centres for children with disabilities, including buildings and parts thereof supplied as housing, subject to certain conditions. Houses with no more than 120 square meters and a value of maximum Lei 380,000 also qualify for the reduced 5% VAT rate.

### *Calculation of VAT*

Any taxable person has the right to deduct the VAT related to purchases, if these are intended to be used for generating taxable revenues.

The difference between the VAT collected by a Romanian VAT payer, and the deductible VAT paid by the same results in a VAT balance, which will be reflected in the VAT return.

If the VAT balance is positive, i.e. the collected VAT is higher than the deductible paid VAT, the VAT balance will have to be paid to the state budget.

If the VAT balance is negative, and the amount of such balance is higher than Lei 5,000, the VAT payer may request the reimbursement by the state of the respective VAT balance. The reimbursement of VAT is usually done after the conduct of a tax audit by the relevant tax authorities.

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As of March 1, 2014, the VAT returns requesting the reimbursement of an amount of less than Lei 45,000, will be granted prior to the conduct of the tax audit. For the VAT returns requesting the reimbursement of an amount higher than 45,000 lei, the tax authority, after a risk analysis, will decide if the tax audit has to be conducted prior, or after the VAT reimbursement.

Within the investment period of a company which is starting a new business, the VAT may be reimbursed prior to the conduct of a tax audit by the relevant tax authorities. In this case, a bank guarantee is necessary, the cost of such letter may be lower than the cost that may be caused by the late reimbursement of VAT.

#### *VAT chargeability*

VAT is usually chargeable on the date of the sale of goods, or of the rendering of services.

The Fiscal Code provides certain exemptions to this rule, i.e. the tax becomes chargeable:

- (i) on the date of the issuance of an invoice, if the invoice is issued before the date when the generating fact occurs;
- (ii) on the date of the receipt of the advance payment, for the payments in advance made before the date of the supply of goods/services.
- (iii) on the date of cash withdrawal, for the delivery or supply of goods or services performed by automatic sale machines, game machines, or other similar machines.

Moreover, the following categories of taxpayers:

- (i) taxpayers registered for VAT purposes in Romania having their registered place of economic activity located in Romania, which registered an annual turnover in the previous fiscal year below Lei 2,250,000; or
- (ii) taxpayers having their registered offices of their economic activity located in Romania, who registered for VAT purposes in Romania during the current calendar year

may opt to charge VAT on the date of receipt of the full, or partial price for the goods, or services sold.

If during the current calendar year, the turnover of the above-mentioned taxpayers exceeds the ceiling of Lei 2,250,000, the option to pay VAT upon receipt of payment for goods or services rendered shall be applicable until the end of the tax period following the period in which the ceiling was exceeded.

The VAT payable upon receipt of the price for the goods, or services rendered is mandatory for the above-mentioned taxpayers. However, this procedure is not applicable to taxpayers which are members of a tax group as defined by the Fiscal Code. Furthermore, the VAT payable upon receipt is applicable only for operations for which the location of delivery or performance is considered to be in Romania.

#### *Invoicing*

The taxpayers must issue an invoice no later than the 15<sup>th</sup> day of the month following the one in which the tax became chargeable.

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The taxpayers must also issue an invoice for the amount of the advance payments received in connection with the supply of goods/services no later than the 15<sup>th</sup> day of the month following the one in which the advance payments were received.

#### *VAT payment*

If the annual turnover of a taxable person is lower than the equivalent of EUR 100,000, the VAT returns must be filed, and the VAT must be paid on a quarterly basis.

If the annual turnover of the respective taxpayer is higher than the equivalent of EUR 100,000, the VAT returns must be filed on a monthly basis, and the VAT balance must be paid on a monthly basis.

For the taxpayers which perform Intra - EU Community acquisitions which are subject to taxation for VAT purposes in Romania, the tax period for VAT purposes will be the month, i.e. the VAT returns must be filed, and the VAT balance must be paid on a monthly basis.

#### *Split VAT payment*

Starting January 2018, the split VAT payment will be mandatory for insolvent firms and companies that register VAT debts over a certain threshold at the end of 2017 and in 2018. For the VAT split-payment mechanism to be implemented, VAT receipts and disbursements must be made from a separate VAT account.

Taxpayers become subject to the the split VAT system if they have VAT debts in excess of the following thresholds:

- a. large taxpayers - RON 15,000;
- b. medium taxpayers - RON 10,000;
- c. small taxpayers - RON 5,000.

Payments to companies, which are subject to the split VAT system must be segregated as follows: the VAT payment must be paid to the VAT account of the payee, and the principal to the regular bank account.

#### *Tax exemption for the import of goods followed by Intra - EU Community deliveries of goods*

According to the provisions of the Fiscal Code, if the import in Romania of goods from a third country, is followed by intra-community deliveries of the respective goods, the said import is VAT exempted. This exemption is granted only if the importer provides the customs authorities with the following information:

- a) code of registration for VAT purposes;
- b) code of registration for VAT purposes of the counterparty to which the goods are delivered in another EU member state;
- c) proof of the fact that the imported goods are to be delivered from Romania to another EU member state, in the same condition they were at the time of the import.

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The customs authorities may request guarantees regarding the VAT related to the import of goods exempted as per the above-mentioned provisions.

In practice, if the import is not immediately followed by an intra-community delivery, the importer may request approval of temporary storage of the goods until a EU counterparty is found, or until the logistics required for the delivery are finalized.

This exemption may be also applicable if the imported goods are subject to more or less complex processing in Romania prior to intra-community delivery.

#### *VAT consolidation*

It is possible for certain companies to form a fiscal group for VAT purposes. For example, a foreign company which establishes two branches in Romania will appoint only one of the branches to register as a Romanian VAT taxpayer.

#### *VAT simplification measures*

For sale-purchase transactions between taxable persons registered for VAT purposes in Romania that involve waste materials, wood or secondary raw materials and certain wheat, VAT is not actually paid, but only evidenced by the purchaser in the VAT return as both output and input tax.

Simplification measures also apply for the transfer of greenhouse gas emission certificates. Consequently, for transactions with such certificates between taxable persons registered for VAT in Romania, the beneficiaries will have the obligation to pay VAT by applying the reverse-charge mechanism.

#### *VAT refund to taxable persons established in the EU or outside the EU*

Taxable persons not registered for VAT purposes and which do not have the obligation to register for VAT purposes in Romania may request a VAT refund from Romania based on the refund request transmitted electronically to the authorities from the Member State where they are registered.

Such requests have to be transmitted to the Member State in which the applicant is registered, until September 30th of the year following the reimbursement period.

The competent authorities from the Member State where the taxable persons are established will forward the request to the competent authority in Romania which will inform the applicant with regard to the request's arrival date.

The settlement period is of 4 (four) months starting from the date when the application is received by the Romanian authorities. The said period will be extended up to eight months if the tax authorities request further information.

Taxable persons established outside the EU also have the right to claim a VAT refund from Romania, based on the reciprocity agreements signed by Romania.

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### **Late payment penalties**

Late payment interest and late payment penalties are applied for late payment of the fiscal claims owed to the State Budget. The late payment interest rate is of 0.02% per day.

Other late payment penalties are as follows:

- (i) the late payment penalty is of 0.01% per day;
- (ii) in case the main tax obligations are established by the tax audit authority due to the fact that they were undeclared or incorrectly declared, the late payment penalty is of 0.08% per day.

### **Additional taxes to be paid by certain economic operators**

As of 2013, the following additional taxes have to be paid by the economic operators which carry out activities related to the extraction and trading of the natural resources:

- (i) special tax of 0.5% applied to the revenues obtained from the exploitation of the natural resources, other than gas - to be paid by the economic operators which carry out activities related to the exploitation and trading of the natural resources;
- (iii) tax of 60% applied to the additional revenues obtained from the deregulation of the prices from the natural gas sector – to be paid by the economic operators which carry out activities related to both extraction and trading of natural gas.

### **Bonus for ANAF employees**

The tax authority may withhold 15% of the funds collected as a result of the tax audits for the purpose of granting motivational bonuses to its employees.

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### **3. ROMANIAN REAL ESTATE LAWS**

*Updated September 2015*

The relevant **Romanian real estate & construction laws and regulations** are:

- ✓ The Romanian Civil Code of October 1<sup>st</sup>, 2011, as amended (“**Civil Code**”)
- ✓ The Romanian Constitution of 2003
- ✓ Land Law no. 18 of 1991 as amended
- ✓ Law no. 50 of 1991 on Authorization of Construction Works as amended
- ✓ Law no. 7 of 1996 on the Survey and Real-Estate Publicity as amended
- ✓ Law no. 213 of 1998 regarding the Public Domain Assets as amended
- ✓ Law no. 312 of 2005 on the Acquiring of Ownership over Real Estate by Foreign Citizens, Stateless Persons and Foreign Legal Entities
- ✓ Law no. 350 of 2001 on Territorial Planning and Zoning, as amended
- ✓ Law no. 247 of 2005 on Reform regarding Property and Legal System, as amended
- ✓ Law no. 10 of 2001 on the Legal Regime of Real Estate Abusively Taken over Between March 6, 1945 and December 22, 1989, as amended
- ✓ Law no. 112 of 1995 on the Legal Regime of Residential Buildings Transferred into State Property, as amended
- ✓ Law no. 33 of 1994 on Expropriation for Public Utility Reasons, as amended, and Law no. 255 of 2010 regarding the Expropriation for Public Utility Reasons, Necessary for Carrying Out Certain Objectives of National, County, or Local Interest, as amended

#### **General**

After the fall of the communism regime in 1989, several laws were enacted with regard to the rights of the former owners to reclaim their properties which were abusively taken over by the State during the communist era, or to obtain compensation in case that the restitution was not possible.

#### **Ownership over land and buildings (“Property”)**

##### *Private & public property*

The property of the State and of the local authorities is divided between the “public domain” and “private domain”.

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The property which is included in the “public domain” is established by law. The State and the local authorities cannot sell or dispose of such assets. However, they may lease or grant a concession of public domain assets to third parties by auction.

The State and the local authorities may dispose of the property which is part of the “private domain”.

Assets in the “public domain” can be transferred to the “private domain” pursuant to normative/regulatory acts of the relevant authority, and may be issued according to the special provisions of the law.

#### *Foreigners’ right to acquire land*

Law no. 312 of 2005 provides the general terms for foreign citizens and/or companies to purchase land in Romania as follows:

- (i) Citizens of European Union (“**EU**”) who are residents in Romania, and EU-based companies, which have a permanent establishment in Romania may acquire ownership rights over land under the same conditions as Romanian citizens;
- (ii) EU citizens who are not residents in Romania, and EU-based companies, which do not have a permanent establishment in Romania, may acquire ownership rights over land five years after the accession of Romania to EU, i.e. starting from January 1, 2012;
- (iii) all the other foreign citizens may acquire ownership rights over the land based on mutual treatment provisions of international treaties concluded between Romania and the foreign citizen’s state - however, no such mutual international treaties have been concluded so far;
- (iv) EU citizens and companies may acquire ownership rights over the land used for agricultural and forestry purposes seven years after the accession of Romania to EU, i.e. starting from January 1, 2014.

#### *Acquisition of the ownership right over buildings by foreigners*

The foreign citizens and/or companies may acquire ownership rights over buildings. A superficies right for as long as the building exists can be established with regard to the plot on which the building is located.

#### **Acquiring Property Rights**

In addition to property rights Romanian law acknowledges the following ancillary rights in respect of real estate property:

- a. superficies;
- b. usufruct;
- c. right of use;
- d. right of habitation;

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- e. easement;
- f. right of administration;
- g. concession right;
- i. mortgage right; and
- j. any other right which may be conferred by a special law.

The ownership right and any of the above rights may be registered with the Property Registry.

#### *Formal requirements*

All deeds transferring ownership rights over real estate property must be executed in notarized form in order to be registered with the Property Registry.

#### *Issues to be reviewed when acquiring property*

When purchasing property, a non-exhaustive due diligence review should cover the following:

- a. property title;
- b. previous property titles;
- c. excerpt of the Property Registry;
- d. fiscal certificate of the seller;
- e. status of the encumbrances over the property, if any;
- f. status of easements for public utilities, if any;
- g. disputes regarding the property, if any;
- h. zoning regime.

#### *Sale and Purchase Agreements*

The most common way to transfer ownership rights over property is by concluding a sale-purchase agreement.

First, the parties may conclude a promissory agreement whereby they agree to conclude the sale and purchase agreement. Such promissory agreement is binding upon the parties. However, if one of the parties does not comply with the promissory agreement, the other party may sue for a declaratory judgment *in lieu* of a sale and purchase agreement, or for damages.

The Civil Code provides that the transfer of ownership over property becomes effective only upon registration with the relevant Property Registry. However, where the survey works of the territorial unit where the respective property is registered are not finalized the transfer of ownership becomes effective according to the agreement of the parties mentioned in the respective transfer contract.

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Under the Civil Code, the forestry may be transferred only by observing the pre-emption right of the co-owners and/or of the neighbours.

The arable land may be transferred only by observing the pre-emption right of the sharecrop farmer.

The main obligations of the seller under the Civil Code are to hand over the property, and to guarantee for eviction. The seller is also liable for hidden flaws.

The buyer's main obligation is the payment of the price. The seller may either initiate an enforcement procedure for the payment of the price, or terminate the contract, if the buyer fails to pay the price pursuant to the contract.

### *Financial Leases*

Pursuant to the Government Ordinance no. 51 of 1997 regarding Leasing Operations and Leasing Companies, real estate may be the object of financial leases. The financial leases regarding real estate must be registered with the Property Registry.

### *Lease Agreements*

The Lease Agreement should be in a written form. No particular formalities are required. In order to be opposable to third parties, the Lease Agreement should be registered with the Property Registry where the real estate is registered.

Pursuant to the Civil Code, Lease Agreements may be concluded for a period of up to 49 years. In case a Lease Agreement is concluded for a period exceeding 49 years, its validity period is reduced up to 49 years.

If the lessor intends to sublease the property, it is advisable to include a clause in the Lease Agreement which would allow the sublease.

Art. 1798 of the Civil Code provides that the Lease Agreement which was registered with the Tax Authority, or was authenticated by a notary is an enforceable title with regard to the obligation to pay the rent.

### *In-kind contribution to the share capital of companies*

Property may be contributed in-kind to the share capital of a company. The value of the contribution must be confirmed by a licensed expert. By bringing real estate as an in-kind contribution to the share capital of a company, the title owner transfers its ownership right over the property to the company.

### **Property mortgaged as security**

The property may be mortgaged in favor of creditors as security for the performance of an obligation or repayment of a debt.

The mortgage agreement in respect of real estate property must be authenticated by a notary.

The rank of the mortgage is determined by the date and time of the registration with the Property Registry. The first creditor to register the mortgage in the Property Registry will have priority over

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subsequent creditors for enforcement purposes. If multiple applications for the same property are received by mail or courier by the Property Registry at the same time, the mortgage rights covered by the respective applications will have the same rank.

The Civil Code provides the possibility of concluding a mortgage over an universality of assets similar to a floating charge. The mortgage over a universality of immovables will only be valid after the registration thereof with the Property Registry with regard to every immovable asset. The mortgage over the universality of present or future immovables is possible only if such immovables serve the current activities of a company.

Although the mortgage over future assets is generally void and unenforceable, the Civil Code provides an exception in case of a mortgage on future constructions that may be built. However, such mortgage can only be temporarily noted in the Property Registry, i.e. until such construction is built. Thereafter, the mortgage over the construction can be registered with the Property Registry.

Also, the mortgage over assets conventionally declared non-transferable shall be considered valid as mortgage on future assets. However, a mortgage over assets declared by law as non-transferable is not possible.

The clauses prohibiting any act of disposal over the mortgaged real estate are not valid according to the Civil Code, even if the buyer was aware of the contractual interdiction to dispose of the mortgaged asset.

*Special encumbrances (privilegii)* over immovables are considered to be legal mortgages according to the Civil Code.

The Civil Code provides several types of *special encumbrances*. Such *special encumbrances* are constituted to the benefit of certain creditors such as (i) the seller of the property for the rest of the price, (ii) the promissory buyer for the advance, if the promise to sell is not executed, (iii) the creditor that provides financing for the acquisition of property, (iv) the architect, contractor, and construction workers for their services, and materials, (v) the person who transferred a real estate in exchange for maintenance, for the payment of the annuity related to the non-performed maintenance, (vi) co-owners for the price owed by the co-owner who purchases their rights re the real estate; (vii) the administrator of the estate for the payment of his/her fee by certain heirs.

A *Movable Mortgage* over the improvements of the real estate may be granted in favour of a creditor. Such movable mortgage can be established based on a mortgage contract, concluded either in authenticated form or under private signature. The movable mortgage has to be registered with the Electronic Archive for Security Interests in Movables. The rank of the registration of the movable mortgage is determined according to date and time of registration of the application.

### **Publicity formalities of the Property Registry**

The Property Registry comprises a description of the property, and of the rights over or in connection with the respective property. The property rights registered with the Property Registry are opposable against third parties.

With regard to the registration of rights with the Property Registry, the Civil Code also provides two legal relative presumptions, i.e. (i) the presumption related to the existence of the act or right if it registered with the Property Registry, and (ii) the presumption of the inexistence of a right which was de-registered.

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The following information is recorded in the Property Registry: name of the owner, survey number, sqm area, location, adjacent neighbours, mortgages, encumbrances, easements, and leases if registered.

The Civil Code provides three types of registration: (i) the registration (*intabularea*), (ii) the provisional registration, and (iii) the notation. The first two refer to real estate rights while the notation mainly concerns other rights, e.g. the interdiction to sell the asset, the destination of a real estate as family home, and legal acts or facts related to the registered real estate, e.g. notation of a claim regarding the respective property.

The Civil Code also establishes the right of any person to have access to public registries, even if such person does not justify an interest.

## **Construction permits**

### *Urbanism Plans*

There are three types of urbanism plans provided by law:

- a. General Urbanism Plan (*Plan Urbanistic General* - “**PUG**”);
- b. Local/Areal Urbanism Plan (*Plan Urbanistic Zonal* – “**PUZ**”); and
- c. Detailed Urbanism Plan (*Plan Urbanistic de Detaliu* – “**PUD**”).

The PUG is a general plan for the development of a certain area. It mainly sets forth the city limits, the zoning of the land located within the city, the areas affected by easements, the protected areas, the requirements function of location, and the conformity requirements of the constructions.

The PUZ is a plan which covers specific areas of the PUG. It ensures coordination between various development plans in the area and the PUG. A construction project must be in compliance with the PUZ approved by the municipality.

The PUD is a technical study that establishes the requirements for building a construction on a plot of land in compliance with the architectural and urbanism regulations. The PUD ensures the coordination between the development plan and the PUG of the respective municipality.

### *Urbanism Certificate*

The law requires the issuance of an Urbanism Certificate (*Certificat de Urbanism*) prior to the start of building, transformation, and demolition works. The Urbanism Certificate provides information regarding the legal, economic and technical regime of the land and of the construction, zoning requirements, as well as the list of approvals and permits that must be obtained in order to obtain a Construction Authorization.

The Urbanism Certificate is issued by the local municipality of competent jurisdiction.

The Urbanism Certificate must be issued within 30 days as of the filing of the application and related documentation.

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### *Construction Authorization*

Construction works can start only after the issuance of the Construction Authorization (*Autorizație de Construire*) that is issued by the local municipality in order to ensure compliance of the future constructions with the legal provisions regarding zoning, design, and scope thereof.

Depending on the zoning of the land and the type of building, there are different steps for the issuance of the Construction Authorization.

The Construction Authorization may only be issued after obtaining the Urbanism Certificate, and the authorizations and permits mentioned in the Urbanism Certificate. The Construction Authorization is issued upon the application of the owner of the project. A lessor, or a concessionaire may also obtain a Construction Authorization provided that it obtains the agreement of the land or building owner in case of remodeling an existing structure.

Construction works, which do not affect the structure of the building, its characteristics, or architecture, may be performed without obtaining a Construction Authorization.

When the construction of the building is finalized, the builder must convoke the beneficiary for the Final Reception, i.e. the handover of the building. The Final Reception is attended by the builder, the designer/architect, a representative of the local municipality which issued the Construction Authorization, and the investor. The attendees sign the Final Reception Minutes which will be used for the registration of the building with the Property Registry.

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#### 4. ROMANIAN ENERGY LAWS

##### 4.1 ROMANIAN ELECTRICITY TRADING LAWS

*Updated October 2016*

The relevant **Romanian electricity trading laws and regulations** are:

- ✓ Commercial Code of Wholesale Electricity Market of 2004
- ✓ Regulation on the Issuance of the Licenses and Authorisations in the Electricity Sector approved by Order no. 12 of 2015 issued by the Romanian Energy Regulatory Authority ("**License Regulation**")
- ✓ Romanian Energy Regulatory Authority Order no. 64 of 2014 approving the Regulation for the Supply of Electricity to Consumers
- ✓ Law no. 231 of 2006 for ratification of the Energy Community Treaty, signed at Athens, on October 25, 2005
- ✓ Order no. 35 of 2006 of the Romanian Energy Regulatory Authority Approving the Methodology Regarding the Monitoring of the Wholesale Electricity Market for the Purpose of Assessment of the Competition on the Market and Preventing the Abuse of Dominant Position
- ✓ Electricity and Natural Gas Law no. 123 of 2012 ("**Electricity and Natural Gas Law**")
- ✓ Procedure regarding the Settlement of the Transactions of Day-Ahead Market ("**DAM**"), issued according to the Order no. 82 of 2014 issued by the Romanian Energy Regulatory Authority
- ✓ Procedure regarding the Registration of the DAM Participants issued according to the Order no. 82 of 2014 issued by the Romanian Energy Regulatory Authority
- ✓ Order of the Romanian Energy Regulatory Authority no. 32 of 2016 regarding the Approval of the Methodology of Preparing the Annual Report by the Electricity License Holders
- ✓ Order no. 60 of 2013 of the Romanian Energy Regulatory Authority Regarding Rules on the Balancing Market
- ✓ Order no. 91 of June 25, 2015 of the Romanian Energy Regulatory Authority regarding the Approval of the Procedure regarding the Acknowledgement of the Participation Right to Romanian Electricity Markets of Foreign Legal Entities Having the Registered Address in a EU Member State

This is a summary of the requirements for access to the Romanian electricity trading market.

#### I. The electricity trading market

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The Romanian electricity trading market is structured as follows:

1. The Wholesale Electricity Market includes the following specific markets:
  - a. the Centralized Market for Bilateral Contracts (“**CMBC**”), with the following subdivisions:
    - (i) the Centralized Market for Bilateral Contracts - Continuous Negotiation Mechanism (“**CMBC-CN**”);
    - (ii) the Centralized Market for Bilateral Contracts - Fuel Processing Mechanism (“**CMBC-FP**”);
    - (iii) the Centralized Market for Bilateral Contracts - Extended Auctions Mechanism (“**CMBC-EA**”).
  - b. the Day-Ahead Market (“**DAM**”);
  - c. the Balancing Market (“**BM**”);
  - d. the Ancillary Services Market, on which the transmission system operator (“**TSO**”) and the distribution operators purchase primary and secondary reserves, voltage and reactive power control, other ancillary services regulated by the Grid Code, and electricity for covering the network losses;
  - e. the Intra-Day Market (“**IDM**”);
  - f. Centralized Market of Double Continuous Negotiated electricity Bilateral Contracts (it operates as an “over-the-counter” market);
  - g. Electricity Market for Large Consumers.
  - h. Centralized Market for Universal Service.

Pursuant to Art. 23 of the Electricity and Natural Gas Law, electricity transactions must be carried out on the competitive market, in a transparent, public, centralized and non-discriminatory manner. Consequently, as of the effective date of the Electricity and Natural Gas Law, the participants to the wholesale electricity market can no longer conclude negotiated contracts for the sale and purchase of electricity, other than those concluded through the participation to one of the centralized markets organized by OPCOM.

ANRE confirmed that the provisions of the Electricity and Natural Gas Law regarding the conclusion of bilateral contracts only on centralized markets do not apply to electricity transit through Romania.

Given that all electricity trading must be carried out through the platforms operated by OPCOM, ANRE requested OPCOM to create an Over the Counter (“**OTC**”) trading platform. Such OTC platform, i.e. Centralized Market of Double Continuous Negotiated Electricity Bilateral Contracts, became operational starting with April 2014.

2. There are also centralized markets for transfer capacities and green certificates, as follows:

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- a. the Market for Allocation of the Available Transfer Capacities, for the allocation of available transfer capacities for interconnection with the national grids of the neighbouring countries.
- b. the Green Certificates Market (“**GCM**”).

The wholesale electricity market is regulated by the Commercial Code of Wholesale Electricity Market of 2004 and by a series of other rules, regulations and procedures issued by the national regulatory authority, i.e. Romanian Energy Regulatory Authority (“**RERA**”), the TSO, i.e. C.N. Transelectrica S.A. (“**Transelectrica**”), and the market operator. The majority shareholder of Transelectrica is the State.

The market operator is OPERATORUL PIETEI DE ENERGIE ELECTRICA OPCOM S.A. (“**OPCOM**”), a company owned by Transelectrica.

3. The Retail Electricity Market (delivery to end-users/consumers).

## **II. Requirements to carry out physical power transactions on the Romanian electricity market**

In order to carry out physical power transactions on the Romanian electricity market, the New License Regulation provides the following possibilities:

1. *To obtain a license in Romania*

According to the License Regulation, RERA may grant two types of electricity licenses covering electricity trading, i.e.:

- (i) an electricity supply license, which covers both electricity trading and electricity supply to end consumers, and
- (ii) a license for the activity of the electricity trader (“electricity trader license”), which covers only electricity trading.

In this case, the foreign company established in an EU member state may file directly with RERA an application for the granting of an electricity supply license or an electricity trader license. Foreign companies not established in an EU member state must establish a physical presence in Romania in the form of a subsidiary, or a branch in order to obtain an electricity license from RERA. The registration of a representative office of the foreign entity is also an alternative, but it can be less efficient in case of certain trading models, due to certain regulatory requirements re power trading on the Romanian market.

The funds of the EU foreign entity, branch or subsidiary which applies for an electricity supply license together with funds available from credit facilities must be of at least EUR 1,000,000. In case of the electricity trader license, the applicant must provide proof of availability of funds of EUR 500,000 at the exchange rate of the National Romanian Bank on the date of the application for the license. Such funds must be maintained for the entire duration of the license.

There is no statutory requirement for having employees with local language capability.

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However, given the day-to-day activity, and the fact that not all the operational procedures to be followed for trading on the market are available in English, the officials of the market operator, and of the transmission system operator usually recommend the licensee to have a contact person involved in the trading activity (balancing, interconnection capacities, transit, import, export, trading on the wholesale electricity market platform) with Romanian language capability.

2. *To act directly based on the electricity license obtained in an EU member state*

Pursuant to RERA Order no. 91 of June 25, 2015 regarding the Approval of the Procedure regarding the Acknowledgement of the Participation Right to Romanian Electricity Markets of Foreign Legal Entities Having the Registered Address in a EU Member State and to the New License Regulation, the electricity supply activity and the electricity trader activity can be carried out in Romania by a legal entity registered in EU without holding a license issued by RERA, if:

- a. the legal entity holds a valid license or a similar document for the relevant activity issued by the competent authority of the member state, and
- b. the legal entity declares on its own responsibility that it will comply with the technical and commercial regulations applicable in Romania for such activities.

As per the above, foreign entities licensed in EU member states are able to enter into electricity transactions without having to establish or act through a local presence in Romania or without obtaining an electricity license in Romania. However, such entities will have to obtain a Decision from RERA confirming the right to participate to the Romanian electricity markets.

### **III. Access to the Romanian power grid**

1. Agreements to be signed with Transelectrica, i.e. the operator of the national electricity transmission system:

- (i) Metering and Aggregation Agreement – to be signed with the branch of Transelectrica which is in charge with the metering of the electricity and aggregation of the metered values.
- (ii) Balancing Agreement – to be signed with the branch of Transelectrica which is the operator of the balancing market (if the license owner wants to register as a balancing responsible party).
- (iii) Agreement for Allocation of Available Transfer Capacities and Transit – to be concluded with Transelectrica; it allows participation in the auctions for cross border capacity on the interconnection lines.
- (iv) Transmission Agreement – to be concluded with Transelectrica; it concerns the services to be rendered by Transelectrica which will allow the licensee to buy electricity directly from the producers and sell this electricity directly to the end users in Romania.

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- (v) Transit Agreement – to be concluded with Transelectrica; it concerns the services to be rendered by Transelectrica which will allow the licensee to transit electricity through Romania.

2. Agreements to be signed with OPCOM:

- (i) Participation Agreement to DAM – is the agreement for the participation on the DAM.
- (ii) Mandate Agreement for Direct Debit - is an agreement to be signed between the participant to the DAM and its bank (from a list of the Romanian banks agreed by OPCOM) regarding the direct debit scheme concerning the payments to be ordered from the account of the participant to DAM which submits electricity purchase offers on the DAM.
- (iii) Participation Agreements to the various segments of CMBC – the agreements to be concluded between the participant and OPCOM re participation to the segments of the wholesale market.
- (iv) Gratuitous Use Agreements re connecting devices for the relevant platforms of OPCOM.
- (v) Participation Agreement to the Intra-Day Market - is the agreement to be concluded between the participant and OPCOM re participation re this segment of the wholesale market.
- (vi) Participation Agreement to the Centralized Market of Double Continuous Negotiated electricity Bilateral Contracts (OTC mechanism).

#### IV. Reporting requirements in Romania

1. *Transaction reporting to RERA*

There are transaction reporting requirements to the Romanian regulator, i.e. RERA. Some of the transaction reporting requirements are also included in the License Conditions attached to the electricity licenses. Other transaction reporting requirements are provided by different rules and regulations.

The transaction reporting requirements are regulated by the Methodology Regarding the Monitoring of the Wholesale Electricity Market for the Purpose of Assessment of the Competition on the Market and Preventing the Abuse of the Dominant Position which was approved by Order no. 35 of 2006 issued by RERA.

Such transaction reports must be sent to RERA, in a template format, until the 25<sup>th</sup> day of the month following the month which is subject to reporting.

2. *Other obligations of reporting to RERA*

The License Conditions further provide for other reporting requirements such like:

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- (i) the annual report, which must provide technical data and information with respect to the activity performed in the electricity sector as well as financial and accounting information regarding the carried out transactions;
- (ii) the financial statements at June 30;
- (iii) transfer of shares and/or assets of the license owner;
- (iv) changes regarding the share capital of the license owner.

Also, there are special procedures issued by RERA regarding the execution and submission of the annual report.

RERA issued over 500 electricity trading licenses according to the information provided on RERA's website. That shows that the Romanian electricity trading market is indeed the key regional market in the Balkans area.

#### **V. Guarantee requested to the participants in view of the registration with the Romanian balancing market**

The steps to be carried out in view of the registration as Balancing Responsible Party ("**BRP**") with the balancing market operator ("**OPE**"), i.e. a branch of Transelectrica, are the following:

1. Obtaining the electricity trading license.
2. Allocation of the ENTSO ("**European Networks of Transmission System Operators**") Identification Code ("**EIC Code**").

If the applicant already has an EIC code, or uses an EIC Code of another entity from the same group of companies, such code can be also used in order to register as BRP in Romania. This EIC Code will have to be mentioned in all documents when requested during the procedures re the registration with OPE, and with the Metering Operator ("**OMEPA**").

3. Filling in the application for the registration.
4. Submitting the above mentioned application with OPE, together with the following documentation attached:
  - (i) Copies of the licenses for all the parties for which the BRP will undertake the balancing responsibility.
  - (ii) The delegation of balancing responsibility for all the market participants for which the BRP undertakes the balancing responsibility, if the case.
  - (iii) Signature samples of the representatives of the BRP. It is not necessary that all the representatives submit signature samples, but only those effectively involved in the electricity trading activity, e.g. in relation with the electricity market authorities, for signing the balancing agreements, for signing the invoices, etc.

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- (iv) Declaration regarding the initiation of the procedures for the conclusion of the Metering/Aggregation Agreement with the metering operator, i.e. OMEPA, a branch of Transelectrica.
- (v) Contact and availability details of the representatives of the BRP.

For the license holders which carry out only electricity trading activities, some of the data mentioned in the standard application for registration as BRP will not be requested. OPE always requests that the contemplated date on which the applicant may be effectively registered as a BRP must be the first day of the month.

Usually, OPE also requests that the application for the registration as BRP, together with the supporting documentation, is filed with OPE with at least 1 week prior to the contemplated date mentioned above.

#### 5. Filing of the Financial Guarantee for registration as BRP

The filing of such guarantee was initially provided in the draft of the Balancing Agreement, but was not requested in practice until 2009. Eventually, Transelectrica, in its capacity as TSO, finalized the Operational Procedure for the filing of such financial guarantees by the BRPs.

The procedure was approved by RERA, i.e. the regulatory authority.

The procedure was initially effective in respect of the new participants which wanted to register with the balancing market. OPE requested the new license owners which want to register as BRP to provide the above-mentioned financial guarantee.

The amount of the financial guarantee to be filed in view of registration as BRP is of Lei 50,000.

As per the request of OPE, the bank letter of guarantee must be granted by a Romanian bank. OPE does have, however, several preferred Romanian banks for the issuance of the said bank letter of guarantee.

The amount of the guarantee for the already registered BRPs will be calculated by OPE according to the provisions of the Operational Procedure, and will be communicated to the respective BRPs.

The guarantee must be renewed each year.

#### 6. Signing and sending to Transelectrica two copies of the Balancing Agreement, together with the addendums and annexes thereof.

#### Notes:

1. *In view of the registration as BRP, the conclusion of the Metering/Aggregation Agreement with OMEPA is also requested.*

*There is a standard metering and aggregation agreement, which must be signed and returned to OMEPA, together with its Annexes. For the electricity supply activity which*

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*does not concern the supply to end users household consumers, the Annexes will mainly include contact details of the license owner.*

*The documentation regarding the registration with OMEPA must be filed with at least 15 working days in advance of the contemplated date for the entering into effect of the metering and aggregation agreement.*

2. *In addition to the above, in order to obtain the full access to the grid and carry out electricity trading, the following contracts have to be signed with the operator of the national transmission system, i.e. Transelectrica, depending on the electricity trading activities which will be carried out by the respective participant to the market:*
  - (i) *agreement for the allocation of available transfer capacity (cross-border) and transit;*
  - (ii) *agreement regarding the transmission services.*
3. *An owner of an electricity trading license which intends to carry out power export operations must also conclude with Transelectrica the Framework Agreement between the Administrator of the Support Scheme and the Contribution Payer for the collection of the contribution for high efficiency cogeneration.*

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## 4.2 ROMANIAN RENEWABLE ENERGY LAWS

*Updated October 2016*

The main Romanian renewable energy laws and regulations in the sector of wind and photovoltaic power are:

- ✓ Law no. 50 of 1991 Regarding the Authorization of Execution of Construction Works (the “**Construction Law**”)
- ✓ Emergency Government Ordinance no. 54 of 2006 Regarding the Legal Regime of the Concession Agreements of Public Assets (“**EGO no. 54**”)
- ✓ Electricity and Natural Gas Law no. 123 of 2012 (“**Electricity and Natural Gas Law**”)
- ✓ Law no. 220 of 2008 Regarding the Establishing of the Promotion System of the Production of Energy from Renewable Energy Sources, as further amended (“**Law no. 220**”)
- ✓ Regulation on the Issuance of the Licenses and Authorisations in the Electricity Sector approved by Order no. 12 of 2015 issued by the Romanian Energy Regulatory Authority (“**License Regulation**”)
- ✓ RERA Order no. 59 of 2013 for the Approval of the Regulation Regarding the Connection of Users to Electricity Grids of Local Interest
- ✓ Government Decision no. 1232 of 2011 Regarding the Approval of the Regulation for the Issuance and Follow-Up of the Guarantee of the Origin of Electricity Produced from Renewable Energy Sources
- ✓ Order no. 4 of 2015 for the Approval of the Regulation for the Issuance of the Green Certificates (“**Order no. 4**”)
- ✓ Order no. 60 of 2015 Regarding the Approval of the Regulation Regarding the Organization and Operation of the Green Certificates Market (“**Order no. 60**”)
- ✓ Order no. 48 of 2014 Regarding the Approval of the Regulation of Accreditation of the Electricity Producers from Renewable Energy Sources for the Application of the Promotion System by Green Certificates

### I. Access to land

#### Concession/Lease/Acquisition of the Land

The land on which a wind or photovoltaic farm can be developed can be procured by concluding agreements for concession, joint-venture agreements, or sale and purchase agreements with local authorities, i.e. Local Councils, or County Councils, or with private entities, i.e. individuals or legal persons.

The land owned by a local authority, e.g. commune, city, or county authorities, may be part of the public domain, or part of the private domain of the said authority.

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## **A. Land of public domain**

In the case of the land of public domain, the local authority is entitled to decide whether it will award a concession, or will conclude a lease contract based on the provisions of the EGO no. 54.

The land which is part to the public domain cannot be sold.

### *1. Concession Agreement*

The Concession Agreement of Public Assets ("**Concession Agreement**") is the contract concluded in written form whereby a public authority, referred to as provider of the concession, acting on its own risk and responsibility, assigns for a determined period of time, to a person, hereinafter referred to as a concessionaire, the right and obligation of exploitation of a public asset in exchange for a royalty.

The Concession Agreement is concluded according to the Romanian law, for a duration which shall not exceed 49 years, starting from its signing date.

The Concession Agreement can be awarded by:

- (i) a tender; or
- (ii) direct negotiation – a procedure whereby the local authority negotiates the contractual provisions, including the royalty, with one or several parties interested in the procedure for the award of the Concession Agreement.

The bidder has the obligation to prepare the offer according to the provisions of the tender documentation.

The local authority has the obligation to award the Concession Agreement by a tender procedure attended by at least three bidders. If two successive tender rounds are attended by less than three bidders, the local authority has the right to initiate direct negotiations with the interested party or parties.

The Concession Agreement must be approved by a decision of the relevant local authority.

### *2. Joint-Venture Agreement*

There are no express tender requirements regarding the Joint-Venture Agreements. Therefore, the local authority may enter into direct negotiation with the interested party regarding such agreement.

The Joint-Venture Agreement must be approved by a Decision of the relevant local authority.

## **B. Land of the private domain**

The land which is part of the private domain of the local authority can be leased, or sold based on the decision of the respective local authority.

## **C. Land owned by private entities**

Rights over land owned by private entities can be acquired as follows:

- (i) by signing a sale-purchase agreement before a Romanian notary;
- (ii) by concluding a lease contract;

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- (iii) by concluding a joint–venture agreement; or
- (iv) by concluding any other forms of cooperation.

## **II. Permits**

The number of permits and authorizations necessary to be obtained varies subject to the location of the land where the wind farm or photovoltaic park will be developed.

### **A. Authorization of the incorporation, i.e. the registration of a special purpose vehicle (“SPV”)**

The criteria and the documentation necessary in order to obtain the authorization of registration of the SPV are regulated by the License Regulation.

The competent authority in respect of the issuance of the authorizations in the electricity sector is RERA.

The applicant must file a set of documents in respect of the issuance of the authorization of registration of the SPV unit with RERA which reviews the documentation and may request further information, or clarifications.

RERA will issue a decision in respect of granting or the refusal of granting of the authorization within 30 days from the payment of the specific tariff, and submission of the above-mentioned documentation.

The granting or the refusal to grant the authorization may be appealed before RERA within 15 days from notification in respect thereof, and further on before the Court of Appeals of Bucharest – the Administrative Litigation Section within 30 days from the receipt of the decision of RERA, or the publication of the respective decision on RERA’s website.

### **B. License for the commercial operation of electricity capacities**

Further to obtaining the authorization of incorporation of the new unit, the SPV must apply with RERA for obtaining the license for the commercial operation of the electricity resources. Such license is obtained by submitting to RERA the documentation mentioned by License Regulation.

Moreover, in order to be licensed as a producer of renewable energy, the applicant must submit to RERA the information regarding the production capacity, as well as the source of energy.

The conditions associated with the license will be provided in the Report issued by RERA regarding the respective license.

RERA will issue a decision in respect of the granting, or refusal to grant the license within 60 days from the payment of the specific tariff and annual contribution, and submission of the specific documentation.

### **C. Grid Access**

This is a process that should be initiated at an early stage of the project by contacting RERA and the transmission company to which the wind farm, or photovoltaic park will be connected.

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The capacities of production of electricity from renewable energy sources are connected to the transmission/distribution electricity grid, to the extent in which the safety of the National Energy System is not affected.

According to RERA regulations, in addition to the Construction Authorization, and the License, the wind farm, or the photovoltaic park operator:

1. must obtain the following permits:
  - (i) Location Authorization (*Aviz de amplasament*) from the transmission system operator, i.e. Transelectrica – issued according to the Methodology Regarding the Issuance of Location Authorizations approved by the RERA Order no. 25 of 2016; and
  - (ii) Technical Connection Authorization (*Aviz tehnic de racordare*)– issued according to the Regulation Regarding the Connection of Users to Electricity Grids of Local Interest, approved by the Government Decision no. 59 of 2013;
2. must obtain from RERA:

A Qualification re the Electricity Priority Production;
3. must register with Transelectrica as a balancing responsible party, or to delegate the balancing responsibility to another balancing responsible party;
4. must register with Transelectrica in order to obtain green certificates;
5. must register with OPCOM in order to sell renewable energy on the day-ahead market;
6. must register with the operator of the green certificates market, i.e. OPCOM, in order to sell green certificates.

#### **D. Construction Authorization**

According to the provisions of the Construction Law, the procedure regarding the issuance of a valid Construction Authorization consists of the following steps:

- (i) issuance of the Urbanism (zoning) Certificate;
- (ii) issuance of the opinion of the competent environment protection authority regarding the investments which are not subject to the evaluation procedures regarding the impact on the environment;
- (iii) notification of maintaining the application for a construction authorization, in case of a project for which the competent environment protection authority requires the evaluation regarding the impact on the environment;
- (iv) issuance of the permits, authorizations, and of the decision of the competent environment protection authority regarding the investments whose impact on the environment was subject to review;
- (v) drafting the technical documentation required for the authorization of the construction works;

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- (vi) filing the application together with the necessary documentation;
- (vii) issuance of the Construction Authorization.

According to the provisions of the Construction Law, the construction of the wind farm, or the photovoltaic park can proceed only after the issuance of a Construction Authorization, issued by the competent Municipality on the basis of the following documents:

- (i) Urbanism Certificate which is issued by the Municipality and covers such issues as zoning, degree of occupancy of the land, height regime, etc, and lists of the permits that must be appended to the application for the issuance of the Construction Authorization, e.g. environment, water, fire, sanitary, etc.;
- (ii) the certified copy of the proof of title over land and/or construction and, where applicable, the up to date survey plan excerpt and the up to date Property Registry excerpt, unless the law provides otherwise;
- (iii) related technical documentation;
- (iv) permits and authorizations, as provided by the Urbanism Certificate, the opinion of the environment protection competent authority and, where applicable, the related administrative decision; and
- (v) proof of payment of the fees for the issuance of Urbanism Certificate and of the Construction Authorization.

The Municipality must issue the Construction Authorization within 30 days from the filing of the application and related documentation.

## **E. Environmental Permits**

### *1. Project stage*

The following permits must be obtained at the project drafting stage:

- (i) Environmental Permit - in case such permit is expressly requested according to the Urbanism Certificate;
- (ii) Environmental Approval for the construction of the wind farm, or photovoltaic park.

The above-mentioned permit and approval are to be issued by the Territorial Environmental Protection Agency following the review of the documentation submitted by the applicant, including the technical specifications.

Depending on the activity carried out and on the number of installed turbines, and also, in case the area where the wind farm will be located is a protected natural area, the Territorial Environment Agency may request the conduct of a survey regarding the impact of such activity upon the environment.

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## 2. *Operational stage*

After the issuance of the environmental permit, in order for the wind farm, or photovoltaic park to become operational, the investor must obtain an Environmental Authorization which is issued by the Territorial Environmental Protection Agency.

### **F. The Registry of the Guarantees of Origin (the “GO Registry”)**

After obtaining the license for the commercial exploitation of electricity capacities, the producer of renewable energy must register with the GO Registry in order to obtain an account. This is a condition precedent to the obtaining of the Certificates of Guarantees of Origin (the “**GO Certificates**”) necessary for the exploitation of electricity resulting from renewable sources.

The GO Certificate is an electronic document which provides an end consumer with the proof that a given electricity quantity was produced from renewable sources.

The electronic application for the issuance of the GO Certificate for the electricity generated from renewable energy sources is mandatory. The producer must apply for the issuance of the GO Certificate within 30 days after the end of the period for which the GO Certificate is requested.

The GO Certificate is issued in electronic format for each electricity unit (MWh) of renewable energy produced and delivered in the electricity grid, and contains at least the following information:

- (i) the date of issuance, the issuing authority, and the country of origin thereof, as well as a identification number;
- (ii) the electricity source out of which the electricity was produced and the initial and the final date of the producing thereof;
- (iii) the identity, location, type and capacity of the installation where the electricity was produced;
- (iv) if, and the extent to which the installation benefitted of investments support;
- (v) if, and the extent to which the electricity company benefitted in any other way of a national support scheme and the type of support scheme;
- (vi) the date when the installation was put into operation.

Only one guarantee of origin can be issued for each electricity unit.

The GO Certificate is issued within 10 working days from the date of the filing of the complete documentation with the competent authority, and is valid for one (1) year from the date of production of electricity referred to.

### **III. Green Certificates Market**

According to the provisions of Law no. 220, the Green Certificates are documents which certify the production of a certain quantity of energy from renewable sources.

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Green Certificates are issued by the transmission system operator, according to the procedure approved by RERA through Order no. 4. All producers of electricity from Renewable Energy Sources (“RES”) receive a certain number of green certificates according to the quantity and source (e.g. wind, solar) of electricity they provide.

The RES electricity producers may sell the Green Certificates on the GCM, which is currently regulated by Order no. 60.

The Regulation for the Organization and Operation of the GCM approved by Order no. 60 establishes:

- (i) the manner of organization and operation of the GCM;
- (ii) the parties involved and their responsibilities in the organization and operation of the GCM;
- (iii) the manner of registration and management of the information regarding the trading of the Green Certificates;
- (iv) the information necessary for the monitoring of the operation of the GCM.

The GCM is a competitive market, separated from the electricity market, in which Green Certificates related to electricity from renewable electricity sources are traded.

GCM has two components:

- (i) the Centralized Green Certificates Market;
- (ii) the Bilateral Contracts Green Certificates Market.

The following are involved in the trading system of the Green Certificates:

- (i) the market participants trading Green Certificates: the electricity producers from electricity renewable sources and the electricity suppliers;
- (ii) the green certificates operator, as administrator of GCM: OPCOM.

The trading of the Green Certificates is not conditioned by the trading of the electricity related thereof.

During its validity period the Green Certificate may be the object of several successive transactions, and will be registered in the account of the purchaser which will use it in the end, in order to prove the fulfilment of the obligation regarding the acquisition quota of Green Certificates. The above-mentioned quota is determined each year, by March 1, by RERA. It refers to the quota of green certificates which must be acquired during a year by (1) the electricity suppliers in relation to the electricity provided to end consumers, or used by themselves, and (2) by the electricity producers in relation to the electricity produced and delivered directly to end consumers.

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## 5. ROMANIAN OIL AND GAS LAWS

*Updated October 2016*

The relevant **Romanian oil and gas laws and regulations** are:

- ✓ Petroleum Law no. 238 of 2004, as amended and consolidated ("**Petroleum Law**")  
**Note:** Under Petroleum Law the definition of "petroleum" covers both oil, and gas.
- ✓ Methodological Norms for the Application of Petroleum Law ("**Norms**")
- ✓ Technical instructions, and other regulations issued by the National Agency for Mineral Resources
- ✓ Electricity and Natural Gas Law no. 123 of 2012 ("**Electricity and Natural Gas Law**")
- ✓ Natural Gas Permitting and Licensing Regulations
- ✓ Natural Gas Network Code, and other regulations issued by the Romanian Energy Regulatory Authority ("**RERA**")

Romania was one of the pioneering countries in the oil and gas sector. The recent commercial discoveries gave an impetus to investment in this sector. The legal framework of the petroleum industry is comprehensive and continues to be updated in line with the relevant European Directives and Regulations and international practice.

### **Regulatory Authorities**

*National Agency for Mineral Resources ("**NAMR**")*

NAMR has the following attributions:

- a. it acts not only as a regulatory authority, but it is also a party to the concession agreements;
- b. it manages the petroleum resources which are the property of the State;
- c. it is in charge of the storage and management of petroleum data and information, and the upkeep of the Petroleum Books for the petroleum blocks;
- d. it has the power to issue mandatory norms, rules, and technical instructions for the application of the Petroleum Law;
- e. it approves the work programs, drilling of exploration wells, well conservation and abandonment, re-entry, field commerciality, development plans, annual production plans, and assignments;
- f. it certifies the technical competence of individuals or legal entities conducting petroleum operations, including operators under concession agreements;

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g. it verifies compliance with laws and regulations.

NAMR may apply fines for failure to comply with the laws and regulations.

*Romanian Energy Regulatory Authority (“RERA”)*

RERA regulates licensing and permitting for gas-related activities.

In relation to the surface, storage, transmission, transit, dispatching, and distribution facilities, RERA issues the following permits:

- a. facility set up permit;
- b. facility operation permit; and
- c. facility alteration permit.

RERA also issues the following licenses:

- a. natural gas supply license;
- b. natural gas transmission license;
- c. natural gas storage license;
- d. natural gas dispatching license;
- e. natural gas distribution license; and
- f. natural gas transit license.

### **Ownership of petroleum resources**

The definition of petroleum provided by Romanian Petroleum Law includes crude oil, condensate, and gas.

The title holder is defined as a party to a petroleum agreement concluded with the competent authority, i.e. NAMR.

The Petroleum Law provides that the underground petroleum resources are public property of the State.

The concession owners have the right to dispose of the oil and gas produced in the perimeters under concession.

Therefore, a question arose with regard to the transfer of petroleum resources to the title holders. The law is silent on this issue. This issue is resolved by including in the agreements clauses which provide that the transfer of the petroleum resources to the title holders takes place at well head.

NAMR is in charge of the management of the petroleum resources.

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All data and information regarding petroleum resources are considered as the property of the State. The companies carrying out petroleum operations may use the relevant data and information for the duration of their operations. The transfer to third parties of data and information regarding petroleum resources must be approved by NAMR.

The works for the development and exploitation of the petroleum resources may be carried out only in relation to the reserves confirmed by NAMR. The documentation for the calculation of the reserves must be prepared by the title holder in accordance with the technical norms issued by NAMR.

### **Petroleum concession**

The petroleum concession is the legal vehicle for the access of investors to petroleum resources.

The initial term of the concession may be of up to 30 years, and it may be extended for a period of up to 15 years.

The concessions for the exploration and production of petroleum resources are awarded through competitive tenders organized by NAMR.

A foreign company which was awarded a concession has the obligation to set up a branch or a subsidiary in Romania within 90 days from the effective date of the petroleum agreement.

The interested parties may initiate the concession award process. It is worth noting that an interested party may apply for non-exclusive exploration permit for a term of up to three years. As mentioned above, if the findings are satisfactory the respective party may initiate the concession award process.

The winning bidder will sign a concession agreement with NAMR. The concession agreement must be further approved by the Government and comes into effect on the date of such approval.

The title holder may assign the concession agreement with the prior approval of NAMR. The change of certain terms of the concession upon assignment may be negotiated with NAMR. In case of the restructuring of the company which is title holder of the concession agreement the concession will be transferred to the successor entity by an order of NAMR President.

Pursuant to Petroleum Law, the transfer of the rights and obligations to an area of a block covered by a concession agreement is possible. Thus, the title holder can transfer:

- (i) a quota of its rights and obligations under the concession agreement with regard to the entire block;
- (ii) a quota of its rights and obligations under the concession agreement with regard to a petroleum area;
- (iii) all rights and obligations under the concession agreement with regard to a petroleum area.

Further to the receipt of an application regarding the delimitation of petroleum areas within a block and regarding the approval of a partial transfer with regard to such petroleum area, NAMR determines whether the delimitation of the petroleum area is acceptable, and informs accordingly the applicants.

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Partial relinquishment of the concession is possible, and is governed by the concession agreement.

The concession agreement terminates upon the expiry of the term of the agreement, and at the request of the title holder in case of force majeure.

Early termination at the request of the title holder is possible. The title holder will have to pay the amount representing the value of the minimum program works which were not performed, and if that is the case, the amount representing the value of the abandonment works which were not performed. Also, the title holder must submit to NAMR a certificate issued by the environmental agency which will attest the performance of the works for remediation of the damages caused to the environment. If the title holder complied with the above described obligations, and NAMR refuses to approve the termination, the title holder may take legal action in the court of competent jurisdiction.

In specific situations provided for by the Petroleum Law, NAMR may suspend the concession, or initiate the termination of the concession agreement.

#### *Title holder's rights*

Petroleum Law provides that the concessionaire has the following main rights:

- a. access to and use of the land;
- b. access to petroleum pipelines, harbours, terminals, and other necessary installations;
- c. use of surface waters;
- d. laying of the pipelines and construction of petroleum production and transportation facilities;
- e. extension of the block to adjacent areas;
- f. access to data re relevant petroleum operations;
- g. to designate the Operator and the Operator's duties;
- h. to dispose of its share of the petroleum production, including the right to export its petroleum share.

#### *Title holder's obligations*

Petroleum Law provides that the concessionaire has the following main obligations:

- a. compliance with the laws, regulations, and the provisions of the petroleum agreement;
- b. preparation of the technical and economic studies re the envisaged petroleum operations and submission thereof to NAMR;

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- c. reporting of all data re petroleum operations, and the controlling actions of the environment, and labour safety authorities to NAMR;
- d. keeping confidential the petroleum agreement, and the data received from the Romanian authorities;
- e. unitization, if required by NAMR;
- f. training of Romanian personnel, and technology transfer;
- g. payment of petroleum royalty.

*Extension of the term of the work phases, change of work programs*

NAMR must approve:

- a. changes to the initial work programs, and extensions of the exploration, development, and production phases;
- b. extension of the block to free adjacent areas; and
- c. change of the estimation of petroleum reserves.

In our experience NAMR was flexible regarding the above matters.

*Stabilization clauses*

The stability of the petroleum agreement is an important principle for the investors in the oil and gas sector. The goal is to guarantee that the terms and conditions of the petroleum agreement in effect on the date of the signing will stay the same over the life of the agreement.

The principle of the stability of the petroleum agreement is incorporated by the Petroleum Law. Thus, the law provides that the terms of the petroleum agreement remain in effect for the duration of the agreement, save for the enactment of legal provisions that are more favourable to the title holder.

However, the law provides that the parties can amend the petroleum agreement by mutual agreement in case of occurrence of unforeseen circumstances.

Usually, in our experience, the petroleum agreements also include stabilization clauses.

*Petroleum Royalties*

The Concession Agreement is a royalty based contract.

The Petroleum Law provides for scaled royalties based on gross production. For crude oil the royalty ranges from 3.5% to 13.5%. For natural gas the royalty ranges from 3.5% to 13%.

The royalty is payable for each commercial field. The commerciality of the field is approved by NAMR. Production is allowed solely from reserves approved by NAMR.

The reference price for the calculation of the royalty is set by NAMR. The royalty is payable quarterly.

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The fiscal legislation provides for the payment of penalties in case of delay of royalty payments. A delay for more than six months is a ground of termination of the concession agreement by NAMR.

#### *Settlement of disputes*

The petroleum agreements may provide for the settlement of disputes by the local courts of law, by arbitration in Romania, or by international arbitration.

Foreign investors in general want to resort to international arbitration.

#### **Farmout/Farmin Agreement, Joint Operating Agreement**

Any assignment of a working interest in a concession must be approved by NAMR. The parties must submit a joint application which will mention the interest quotas, the corporate approvals, and proof that the transferee is in good standing, and has adequate financial and technical capabilities to perform the petroleum operations.

On the date of the filing of the application the transferor must have complied with the obligations assumed under the petroleum agreement. If that is not the case, the transferee must assume the obligation to be responsible for the transferor's outstanding obligations as well.

The Farmout/Farmin Agreement and related documentation, e.g. Joint Operating Agreement, Instrument of Transfer, Novation, etc. do not have to be submitted to NAMR.

#### **Access to land for petroleum operations**

The Petroleum Law and the Electricity and Natural Gas Law create legal easements regarding access to land needed for petroleum operations and installations in favour of the title holders.

The Petroleum Law provides that the title holder must pay an annual rent to the land owner. If the parties fail to agree on the amount of the rent the dispute must be referred to the court of competent jurisdiction. The law provides that any damages claimed by a landlord will be estimated function of the value of the affected crop, or the market value of the land.

The Electricity and Natural Gas Law provides that the title holders have the following rights:

- a. the right of use in relation to the necessary works for the rehabilitation of the gas production installations;
- b. the right of use in relation with the normal operation and maintenance of the gas production installations;
- c. the legal underground, surface, and air right of way for the installation of pipelines, power lines, or other equipment related to the gas production installations, and for the access to the location of such ancillary equipment;
- d. the right to obtain the reduction or cease of activities which would endanger the gas installations, and the public safety, such like obtaining interdictions to build, to dig trenches, and to deposit materials in the protected zone, or to carry out any works which would affect the gas production installations, and the related pipelines;
- e. right of access to utilities.

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The statutory protection of the land easements for gas production operations was confirmed by court practice.

It is important to note that in addition to establishing a statutory easement for operations related to gas production, the law also gives the right to the concessionaire to demand the reduction or cease of activities of third parties in the vicinity of the gas installation, which could endanger the operation of the gas installations and equipment. The Electricity and Natural Gas Law spells out the interdictions to build, to dig trenches, and to deposit materials in the safety area, or to carry out any works which would affect the gas production installation, and the related pipelines, and equipment.

Furthermore, the Electricity and Natural Gas Law provides that the statutory easements for gas production are granted for the life of the gas production installation.

The Electricity and Natural Gas Law provides adequate legal basis for the statutory land easements related to gas production, and for their enforcement.

### **Petroleum transportation system**

The National Petroleum Transportation System is public property of the State.

The systems for the transportation of oil and gas are operated by two state-owned companies, Conpet, and Transgaz respectively.

The above operators have the obligation to provide equal access to the interested parties. The Petroleum Law, and the Electricity and Natural Gas Law specify the cases in which the operators may deny access to the transportation systems. The party whose access to the transportation system was denied may file a complaint with the competent authority.

The access to the natural gas transmission system is regulated in accordance with the provisions of the EU Regulation no. 715 of 2009 regarding the Conditions of Access to the Gas Transmission Systems, and with the Romanian regulations.

The access to the National Gas Transmission System ("**NTS**") has three stages:

- a. the inquiry to the operator of the NTS re the possibility to access the NTS in a specific area;
- b. the booking by the respective applicant of capacity within the NTS;
- c. the connection to the NTS.

The access to the upstream feeding pipelines is arranged in accordance with the provisions of the Romanian regulations and is granted by the respective operator of the upstream feeding pipeline.

The rules for the access to the storage facilities are provided by Romanian regulations.

The access is provided based on classes of priority, and according to the rule "first come, first served", within the same class of priority.

The tariffs regarding gas transmission services and gas storage are regulated by RERA.

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## **Attestation and authorization of the technical competence**

According to NAMR Order no. 122 of 2006, the companies and the professionals working in the oil and gas sector must obtain certificates of attestation of the technical competence. The certificates are issued by a Commission of Attestation set up by an order issued by NAMR. The above Order lists the documents which must be appended to the application for the issuance of the certificate of attestation. The documentation must include a memorandum regarding the relevant petroleum operations carried within three years prior to the submission, documents attesting the technical qualifications of the personnel, and documents regarding the financial capacity of the applicant.

According to RERA Order no. 98 of 2015, the companies and the professionals which perform activities regarding project design, execution, and operation of installations for the production, underground storage, transportation, distribution, and utilization of natural gas must be authorized by commissions appointed by RERA. The above Order no. 98 enumerates the documents which must be appended to the application for the issuance of the certificate of attestation.

## **Centralized Markets for Natural Gas**

Currently there are two Centralized Markets for Natural Gas in Romania:

- (i) The Centralized Market for Natural Gas operated by OPCOM;
- (ii) The Centralized Market for Natural Gas operated by the Romanian Commodities Exchange.

Both OPCOM and the Romanian Commodities Exchange issued procedures regarding the registration and participation of the participants to the Centralized Markets for Natural Gas, which were approved by RERA.

Starting with July 2014, RERA regulated the obligation of natural gas producers and suppliers to conclude transactions through the Centralized Markets for Natural Gas.

Thus, according to the Order no. 118 of 2014 of the President of RERA, in 2017 the natural gas producers have the obligation to sell on the Centralized Markets for Natural Gas at least 25% of the natural gas of their internal production for the internal consumption of the competition market, while in 2018 at least 20% of their internal production. The minimum amount to be sold on the Centralized Markets for Natural Gas is to be determined by RERA pursuant to the information provided by the natural gas producers.

Pursuant to the Emergency Ordinance no. 64 of 2016, which amends the Electricity and Natural Gas Law, natural gas producers and suppliers have the obligation to conclude agreements on the Romanian competitive markets in a transparent and non-discriminatory manner. Starting with April 1, 2017, natural gas producer no longer have the obligation to ensure with priority the natural gas to cover the consumption for the household customers, therefore they can trade the entire quantity of natural gas on the competitive market. Also, the timetable for the liberalization of domestic natural gas prices for household consumers will be removed starting with 1 April 2017.

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## 6. ROMANIAN MINING LAWS

*Updated September 2015*

The relevant **Romanian mining laws and regulations** are:

- ✓ Mining Law no. 85 of 2003 ("**Mining Law**"), as further amended
- ✓ Government Decision no. 1208 of 2003 regarding the Approval of the Norms for the Application of the Mining Law
- ✓ Order no. 197 of 2003 of the National Agency for Mineral Resources for the Approval of the Methodological Norms regarding the Performance of Specialized Survey Works in the Mining Extractive Sector
- ✓ Order no. 202 of 2013 of the National Agency for Mineral Resources for the Approval of the Technical Instructions regarding the Application and Follow-Up of the Measures Established in the Environment Rehabilitation Plan, in the Extraction Waste Management Plan and in the Technical Project For Environment Rehabilitation, as well as the Operation Manner with the Financial Guarantee for the Rehabilitation of the Environment Affected by Mining Activities
- ✓ Order no. 144 of 2005 of the National Agency for Mineral Resources regarding the Approval of the Framework Template of the Minutes regarding the Ascertainment and Sanctioning of Contraventions in the Sector of Performance of Mining Activities
- ✓ Order no. 122 of 2006 of the National Agency for Mineral Resources regarding the Approval of the Methodology for Attesting the Technical Competence of the Legal Entities who Draft Documentations and/or Perform Geological Research Works, Works regarding the Exploitation of Petroleum and Mineral Resources and Preparation of Expert Reports, as well as of Natural Entities who Draft Documentations and/or Perform Geological Research Works and Preparation of Expert Reports;
- ✓ Order no. 94 of 2009 of the National Agency for Mineral Resources for the Approval of the Technical Instructions regarding the Issuance of Production Permits
- ✓ Order no. 198 of 2009 of the National Agency for Mineral Resources regarding the Method of Registration, Reporting, Calculation and Payment of the Tax on Mining Activity and Mining Royalty, as amended by Order no. 81 of 2013 of the National Agency for Mineral Resources
- ✓ Order no. 138 of 2010 of the National Agency for Mineral Resources regarding the Approval of the tariffs charged for the documents issued by the National Agency for Mineral Resources in the mining sector
- ✓ Government Emergency Ordinance no. 102 of 2013 regarding the Amendment and Supplementation of the Law no. 571 of 2003 regarding the Fiscal Code and the Regulation of Certain Fiscal and Financial Measures (including the amendment of the level of the mining royalties)

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- ✓ Government Decision no. 350 of 2015 regarding the Update of the Fees for Mining Activities provided by the Mining Law no. 85 of 2003

### **Ownership of minerals**

According to the Mining Law, the Romanian State has exclusive public property rights over the mineral resources located on the territory and in the subsoil of the country.

Although the Romanian State is the exclusive owner of the mineral resources located on the territory of the country, the mining license owner has the right to dispose of the mineral resources mined under the license.

### **Procedure for the issuance of the mining permit and license**

Pursuant to the Mining Law, permit/licenses are granted for coal, ferrous and non ferrous minerals, aluminum minerals and aluminiferous rocks, noble, radioactive, rare and dispersed metals, minerals, haloid salts, non metallic useful substances, useful rocks, precious and semiprecious stones, peat, mud and therapeutically peat, bituminous rocks, non-combustible gas, geothermal waters, gas associated to them, natural mineral waters (gaseous and non-gaseous), mineral therapeutically waters, as well as mining residues from barren dumps and tailing ponds, underground drinkable and industrial waters.

The National Agency for Mineral Resources (“**NAMR**”) is the authority in charge of granting the permits and licenses. Under Romanian law, NAMR plays a dual role. On the one hand, it is the main regulatory authority in the mining sector. On the other hand, it represents the State as a party to the concession agreements for mining licenses.

The Prospecting Permit is granted by NAMR within 30 days as of the fulfillment by the applicant of the conditions included in the technical instructions of NAMR.

NAMR, or the interested Romanian or foreign company may initiate the process for the award of a concession of exploration and/or exploitation activities.

The Exploration and Exploitation Licenses are granted to the winners of the tenders organized by NAMR. The list of exploration and/or exploitation blocks which will be the object of the tender is decided upon by NAMR.

In order to participate to the tender, the Romanian or foreign bidder must submit their offers and documentation required by the Tender Book issued by NAMR. The documents may include the proposed exploration and/or exploitation program (which includes the annual exploration Works Programs and related expenditures), documents regarding the technical and financial capabilities of the applicant, and other documents requested by NAMR mentioned in the Tender Book.

The offers will be reviewed by a Committee of NAMR according to the general criteria provided by the Norms for the Application of the Mining Law, and by the Tender Book.

The winner of the tender will negotiate with the Committee the conditions and the clauses of the mining license, including the development program. The Exploration License enters into effect as of the date of the publication of the Order of NAMR re the approval thereof in the Official Monitor, while the Exploitation License enters into effect as of the date of the publication in the Official Monitor of the Government Decision approving the issuance of the Exploitation License.

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The Exploitation License is granted by NAMR directly to the owner of an exploration license within 90 days as of the submission to NAMR of the final exploration report for any discovered mineral resources.

The title holders of mining licenses/permits are obliged to register with the Territorial Inspection Department for the Mineral Resources of the NAMR.

### **Grant of mining permits and licenses**

The mining activities may be carried out by Romanian, or foreign companies, which are registered according to the law, and are specialized and certified for performing mining operations.

The foreign companies may be granted mining permits and licenses. However, according to the Mining Law, within ninety (90) days as of the date when the license entered into effect, the foreign company, which obtained the right to perform mining activities, must set up and maintain a subsidiary in Romania for the whole duration of the concession.

### **Type and duration of mining permits and licenses**

Pursuant to the Mining Law and the Norms for the Application of the Mining Law, the following mining permit and licenses may be granted by NAMR:

#### *(i) Prospecting Permit*

The Prospecting Permit is a non-exclusive permit which covers, among others, assessment and interpretation studies of pre-existent information, and works of geological classification, geochemistry, magnetometry, radiometry, electrometric analysis, seismometry, open-air excavation, laboratory analysis.

The Prospecting Permit is issued for a period of up to three (3) years, without the possibility to be extended.

#### *(ii) Exploration License*

The Exploration License is an exclusive license that covers specific studies and works which are necessary for the identification of the deposits of mineral resources/reserves, quantity and quality evaluation, and technical and economic conditions for the purpose of development.

The Exploration License is issued for a period of maximum five (5) years, and may be extended for a period of maximum three (3) years.

#### *(iii) Exploitation License*

The Exploitation License is an exclusive license that covers the works which are necessary for the opening of mines and open pits, i.e. construction and assembly of the plant, equipment and other specific installations, which are necessary for the extraction, processing, transportation and temporary storage of the mining products, tailings and residual products, outside and/or underground works for the extraction of the mineral resources/reserves and their processing and delivery, as well as the research works for the increase of the knowledge regarding the respective mineral resources/reserves.

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The Exploration License is issued for a period of maximum twenty (20) years, and may be extended for consecutive periods of maximum five (5) years each.

### **Main obligations under mining permit/license**

The obligations of the owner of the mining permit/license are provided by the license granted by NAMR, and are supplemented with the general obligations provided by the Mining Law.

The owner of the mining permit/license has the following main obligations:

- (i) to comply with the provisions of the Mining Law, the norms and the instructions issued for the application thereof and with the provisions of the license/permit;
- (ii) to prepare the technical and economic documentation for carrying out the mining activities, and the documentation for environmental protection, in accordance with the provisions of the permit/license, and to submit such documentation for approval;
- (iii) to obtain, to prepare, to keep up to date and to submit to NAMR, on the scheduled dates, all data, information, and documentation mentioned in the license/permit, concerning the mining activities carried out, and the results obtained in order to be registered with the Mining Book and the Mining Cadastre;
- (iv) to keep confidential the data and information legally obtained from NAMR and the data acquired through its own operations, and to not disclose such data, except as provided in the license;
- (v) to implement, on the scheduled dates, the measures issued in writing by NAMR;
- (vi) to execute and finalize the environmental rehabilitation works of the perimeters affected by the mining works performed;
- (vii) to carry out, upon termination of the concession, the works for the care and maintenance/closure of the mine/quarry, as the case may be, including the post-closure monitoring program;
- (viii) to maintain, for the whole duration of the exploitation, the financial guarantee for environmental rehabilitation;
- (ix) to pay the fees related to the mining activities and the royalties, within the terms provided in the Mining Law;
- (x) to start performing mining activities within 210 days, as of the entry into effect of the license.

### **Transfer or assignment of mining license, using the mining license for financing purpose**

The owner of a license can transfer its rights and obligations under the said license to another legal entity only subject to the prior written approval of NAMR. Any transfer carried out without the written prior approval of NAMR is void.

The Norms for the Application of the Mining Law provide the conditions which must be fulfilled by the company to which the license will be transferred, and the documents which must be submitted to NAMR for the purpose of obtaining the approval of the transfer of the license.

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Also, the Mining Law provides that the license owner may ask NAMR to certify in writing the existence of the license for the purpose of obtaining bank loans in order to carry out the mining activities under the license.

### **Cancellation of mining permit/license**

NAMR will annul the mining permit/license upon finding that:

- (i) the permit/license owner does not fulfill its obligations regarding the authorization, and the date of commencement of the mining activities;
- (ii) the operations are interrupted for a period of more than 60 days, without the agreement of the competent authority;
- (iii) the permit/license owner uses exploitation methods or technologies other than those provided in the development plan without NAMR's approval;
- (iv) the permit/license owner conducts mining activities without the annual approval of the works program;
- (v) the authorization of the permit/license owner regarding the protection of the environment and/or the labor safety was cancelled;
- (vi) the permit/license owner willfully provides the competent authority with false data and information regarding its mining activities, or violates the confidentiality requirements provided by the license;
- (vii) the permit/license owner does not pay the taxes and royalties owed to the Romanian State within six months from the due date;
- (viii) the permit/license owner fails to fulfill the conditions and the one-year term provided regarding the suspension of the license/permit as per the provisions of the Mining Law.

### **Easement for mining activities**

According to the Mining Law, the permit/license owner has a legal easement right over the land needed for mining exploration and production operations, and over the land needed to access the respective exploration and production sites. The duration of the legal easement right is for the entire term of the mining activities.

The permit/license owner must pay an annual rent to the owners of the land for exercising its easement right, and therefore must negotiate a lease agreement with the respective land owner.

### **Attestation and authorization of the technical competence**

According to NAMR Order no. 122 of 2006, as further amended, the companies and the professionals working in the mining sector must obtain certificates of attestation of the technical competence. The certificates are issued by a Commission of Attestation set up by an order issued by NAMR. The above Order lists the documents which must be appended to the application for the issuance of the certificate of attestation. The documentation must include, a memorandum regarding the relevant mining operations carried within three years prior to the

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submission, documents attesting the technical qualifications of the personnel, and documents regarding the financial capacity of the applicant.

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## 7. ROMANIAN PROJECT FINANCE

*Updated September 2015*

The relevant **Romanian project finance law and regulation** are:

- ✓ Civil Code of 2011 as amended
- ✓ Government Decision no. 802 of 1999 approving the Regulation for the Organization and Operation of the Electronic Archive of Security Interests in Movables
- ✓ Government Emergency Ordinance no. 79 of 2011 for the Regulation of Certain Measures Necessary for entering into effect of the Law no. 287 of 2009 regarding the Civil Code, as approved and amended by the Law no. 60 of 2012

### **Types of transactions**

Project finance transactions involve a Loan Agreement/Credit Facility Agreement, and related Security Agreements, such like Agreement for Mortgage of Shares (*contract de ipoteca mobiliara asupra actiunilor*), Mortgage Agreement, Security Agreement on the Universality of Movable Property of the pledgor, Security Agreement over Equipment and Machinery, Security Agreement over Receivables, Security Agreement over Accounts, Security Agreement over Intellectual Property Rights, and Guarantee Agreement.

According to recent practice, the pledge of insurances can be achieved via Security Agreement on the Universality of Movable Property of the pledgor.

The Security Agreement on the Universality of Movable Property of the pledgor operates similar to a floating charge under English law, i.e. covers both the movables owned by the pledgor on the effective date, as well as future movable assets acquired by the pledgor. A Security Agreement on Universality of Movable Property can concern only an universality of movable property affected to the activity of an undertaking.

Other agreements such like Escrow Agreement, or Mandate Agreement in the case of bank syndicates, are also signed by the parties.

The parties may choose that the Loan Agreement/Credit Facility Agreement is governed by English law, and English courts have exclusive jurisdiction. However, it may be further provided that the Finance Party, or Secured Party are allowed to take concurrent proceedings in any other courts, and any number of jurisdictions.

Under Civil Code, the Security Agreements involving shares, and real estate must be governed by Romanian law. Further, all disputes regarding real estate must be heard by the court which has jurisdiction at the location of the real estate in question.

### **Legal advice**

The local counsel is usually required to review the draft Loan Agreement/Credit Facility Agreement, the Escrow Agreement, if that is the case, and the Mandate Agreement drafted by the lead counsel of the bank, or of the bank syndicate. The scope of the review is compliance

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with Romanian law, and the appropriate relation between the Credit Facility Agreement and the security agreements regarding the Borrower's assets based in Romania.

Further, by case the local counsel may be required to carry out a due diligence review regarding the status of the Romanian assets. Usually, in case of movables, i.e. pledges of shares, equipment and machinery, accounts, insurances, intellectual property rights, and mortgages, the due diligence research consists in a review of the database of the Electronic Archive of Security Interests in Movables ("**Electronic Archive**").

In the case of real estate, the due diligence research consists of a review of the property certificate issued by the Property Registry. In order to obtain such property certificate, the mortgagor must provide the survey number of the property.

Further, the local counsel is required to draft or review the security agreements related to the transaction, the corporate approvals for pledging or mortgaging the Romanian assets as security, to register the security agreements with the Electronic Archive, and to issue a Legal Opinion for the benefit of the Lender.

### **Pledge of shares of a limited liability company**

The shares of the Romanian joint stock companies are freely tradable. The preemption rights regarding the transfer of the shares in a joint stock company do not represent an obstacle in case of enforcement of a Share Pledge Agreement.

However, in many instances the Romanian subsidiaries of the multinational companies are registered in Romania as limited liability companies with one or two shareholders. The Romanian Company Law provides that the transfer of the shares of a limited liability company must be approved by the vote of 3/4 of the shareholders. From a procedural point of view that means that in case of enforcement of a pledge of shares in a limited liability company, a decision of the General Meeting of the Shareholders of the limited liability company approving the transfer of the pledged shares to the pledgee is required.

In order to avoid the risk of refusal by the shareholders of the limited liability company to approve the transfer of the pledged shares to the pledgee it is recommended to request the pledgor to submit at the time of the signing of the Share Pledge Agreement, a decision of the sole shareholder or of the General Meeting of the Shareholders which specifically approves the transfer of the pledged shares to the pledgee in case of default.

### **Electronic Archive**

The Electronic Archive is an electronic database organized and functioning under the authority and supervision of the Ministry of Justice. The Electronic Archive is the authority of registration of the security interests in movable property, i.e. pledges/movable mortgages. By registration with the Electronic Archive the security interests are placed on public record.

The registration of the movable mortgages/pledges with the Electronic Archive is processed by authorized operators. The interested parties file their applications in respect of the registration, amendment, or de-registration of the movable mortgages/pledges with such authorized operators.

The priority ranking of the movable mortgages/pledges is established function of the date of registration. The security interest registered earlier in time has a superior ranking over a subsequently registered security interest.

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## **Legal Opinion**

The Legal Opinion must list the documents reviewed and drafted by the local counsel, and must opine on the capacity of the signatories, compliance with Romanian law, validity of the corporate approvals, fulfillment of the execution formalities, and on any other specific issues as required by the client.

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## 8. ROMANIAN CAPITAL MARKETS LAWS

*Updated September 2015*

The relevant **Romanian capital markets laws** and regulations are:

- ✓ Law no. 297 of 2004 regarding the Capital Market, as amended (“**Capital Market Law**”)
- ✓ Emergency Government Ordinance no. 25 of 2002 regarding the approval of the Statutes of the National Securities Commission as amended
- ✓ Regulation no. 15 of 2004 issued by the National Securities Commission (“**Securities Commission**”) regarding the Authorization and Functioning of Investment Management Firms, Collective Investment Undertaking and Depositories
- ✓ Regulation no. 13 of 2005 issued by the Securities Commission on the Authorization and Functioning of the Central Depository, the Clearing Houses and Central Counterparties as amended
- ✓ Regulation no. 01 of 2006 issued by the Securities Commission on Issuers and Operations with Securities as amended
- ✓ Regulation no. 02 of 2006 issued by the Securities Commission on Regulated Markets and Alternative Trading Systems
- ✓ Regulation no. 14 of 2006 issued by the Securities Commission modifying Regulation no. 2 of 2006 on Regulated Markets and Alternative Trading Systems
- ✓ Regulation no. 31 of 2006 issued by the Securities Commission amending the Securities Commission Regulations by Implementing Certain Provisions of European Directives as amended
- ✓ Regulation no. 32 of 2006 issued by the Securities Commission on Investment Services as amended

### KEY INSTITUTIONS

#### ***ASF - Financial Supervisory Authority***

The Financial Supervisory Authority (“**ASF**”) was established as an autonomous, specialized, with legal status, independent, self-financed administrative authority, exercising its duties by taking over and reorganizing all duties and powers of the National ASF(CNVM), the Insurance Supervisory Commission (CSA) and the Private Pension System Supervisory Commission (CSSPP).

In cases of breaches of the securities laws, the ASF has the power to apply fines, and to suspend trading of the stock of the companies affected by the respective breaches.

Derivatives are effectively traded on two regulated markets, one operated by the BSE and one by the Sibiu Monetary - Financial and Commodities Exchange (“**Sibex**”).

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### ***Bucharest Stock Exchange (“BSE”)***

BSE was created in 1995. This is the main stock exchange in Romania.

BSE is a joint-stock company under the supervision of the ASF, being able to adopt its own set of regulations.

### ***Sibiu Monetary Financial and Commodities Exchange (“SIBEX”)***

Sibex was authorized by the Securities Commission, ASF’s predecessor and was set up in 2006.

Sibex launched several derivative financial instruments.

### ***The Central Depository***

The Central Depository is a legal entity established as a joint-stock company, authorized and supervised by the ASF. The clearing-settlement operations are carried out through the Central Depository.

The members of the Central Depository’s Board must be individually validated by the ASF before exercising their mandates. The shareholders are not allowed to hold more than 5% each of the voting rights, except for the market operators which are entitled to 75% of the voting rights subject to the prior approval from the ASF.

The operations carried out by the Central Depository are supervised by the ASF.

### ***Clearing Houses***

The Clearing Houses are the entities responsible for ensuring the clearing and settlement of transactions with derivatives and act under the supervision of the ASF. The Clearing Houses are registered as joint-stock companies and require a prior authorization issued by the ASF.

The transactions carried out on SIBEX are settled through the Sibiu Clearing House, while the transactions carried out on BSE are settled through the Bucharest Clearing House.

### ***Investors’ Compensation Fund***

The Investors’ Compensation Fund (“**Fund**”) is established as a joint-stock company approved by the ASF. The intermediaries and the management companies whose object of activity is the management of individual investment portfolios are the shareholders of the Fund.

The intermediaries authorized to provide investment services and management companies, which manage individual investment portfolios, have to be members of the Fund. The Fund’s major role is to compensate the investors in case that the Fund members fail to reimburse the money or the financial instruments held on their behalf. The Fund compensates the investors within the limits established by the President of ASF on an annual basis.

## **KEY PLAYERS**

### ***Financial Investment Services Companies***

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The intermediaries which provide investment services in Romania are the financial investment services companies authorized by the ASF, the credit institutions authorized by the National Bank of Romania, as well as the equivalent of such entities that have been authorized by the competent authorities of the relevant Member States of the European Union ("EU").

Financial Investment Services Companies (*S.S.I.F.*) are legal entities, established as joint-stock companies, authorized by the ASF to provide investment services. Such authorization provides what type of investments services the respective Financial Investment Services Company is entitled to perform.

The principal financial investment services are related to the sale and purchase of financial instruments on behalf of investors or on their own account, the management of investment portfolios within the limits of their mandates and the placement of financial instruments.

Other related services include the administration of financial instruments, the safe custody services, the granting of credits to investors, and providing investment advice concerning financial instruments.

The initial registered capital of a Financial Investment Services Company is to be determined according to the ASF regulations which provide certain thresholds for such capital depending on the type of investment services provided by the respective company. A Financial Investment Services Company has to comply with the authorization conditions, prudential and capital requirements as required by the ASF.

The Financial Investment Services Company has to notify any change in its organization and operation to the ASF.

The ASF has to be notified in case any person intends to acquire directly or indirectly the shares of a Financial Investment Services Company, thus becoming a significant shareholder, or intends to dispose, directly or indirectly of such position held in a Financial Investment Services Company.

Also, any significant shareholder which proposes to increase or decrease its holding, so that the proportion of the voting rights or of the share capital would reach, exceed, or fall below 20%, 33% or 50% has to notify the ASF first.

#### *Agents of Financial Investment Services Company*

Investment services are provided by agents of Financial Investment Services Companies registered with the ASF Register.

#### *Foreign intermediaries*

With regard to foreign intermediaries, their ability to operate in Romania depends on whether they are domiciled in a Member State of EU or in a non-member State. If the Financial Investment Services Company is authorized by the competent authority in a Member State, it may provide, on the Romanian territory, investment services either directly or via a branch. In case of Financial Investment Services Company domiciled in countries which are not members of EU, such companies can carry out financial investment services by setting up branches in Romania, which must be authorized by the ASF.

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### *Traders*

Traders are legal entities which carry out transactions with derivatives such as futures and options contracts in their own name only. Such entities must be authorized by the ASF, and registered in the ASF Register. The clearing and settlement of the transactions concluded by the traders have to be carried out only through intermediaries.

### *Investment Consultants*

The investment consulting services regarding financial instruments may be provided by Investment Consultants, natural or legal persons, which are registered with the ASF Register.

### *Rating Agencies*

The ASF issues regulations regarding the selection criteria for Rating Agencies which evaluate and rank the listed companies and the financial instruments traded on the stock exchanges.

### *Management Companies*

The management companies (S.A.I.) are legal entities registered as joint-stock companies, and authorized by the ASF.

The main object of activity of such companies is the management of undertakings for collective investment in securities. The initial registered capital of management companies has to be of at least the Lei equivalent of EUR 125,000.

### *Depository*

The Depository is considered to be a credit institution authorized by the National Bank of Romania or a Romanian branch of a credit institution authorized in a Member State which is entrusted for safekeeping of all the assets of an undertaking for collective investment in transferable securities.

### *Undertakings for collective investment (Rom. - Organism de Plasament Colectiv)*

The Undertakings for Collective Investment in securities are either open-ended investment funds set up under civil contracts, or closed-end investment funds. Each such undertaking:

- (i) performs collective investment services;
- (ii) at the holders' request must ensure the redemption of the units.

The Undertakings for Collective Investment are undertakings authorized by the ASF whose object of activity is the collection of financial resources in order to perform collective investments by investing cash resources in liquid financial instruments.

### *Open-Ended Investment Funds*

This is a fund whose units are traded on the stock exchange. Such fund units have to be of a single type, fully paid at the time of their subscription and shall confer equal rights to their holders.

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Apart from these units, the fund cannot issue any other financial instruments. The value of the units will be published daily by the Management Company for each working day, based on the data certified by the Depository.

#### *Close-end funds*

This is a fund which is set up as a joint-stock company, and is managed by a Management Company. The fund units issued by the close-end funds have to be of a single type, fully paid at the time of their subscription and shall confer equal rights to their holders.

### **CAPITAL MARKET LISTING REQUIREMENTS**

In order to be eligible for listing on a stock exchange, the Capital Market Law stipulates certain requirements regarding both the issuer company and its shares.

The listing on the stock exchange of certain shares requires the prior publication of a Prospectus approved by the ASF. The Prospectus must comply with the requirements of the ASF.

The company which applies for the listing must be registered for at least three years prior to the request for listing on the stock exchange. Further, the company must have an estimated net worth of at least EUR 1 million. If such a valuation is not available, the company must have a share capital plus the reserves (including the profit or loss of the last financial period) worth at least EUR 1 million.

The shares of the company applying for listing on the stock exchange must be negotiable and fully paid for. In addition, the company applying for listing must ensure a free float of 25% of its outstanding shares for the public, or a lower float if a large number of shares are distributed among investors.

### **MANDATORY CORPORATE DISCLOSURE**

In order to ensure a fair and equal treatment to all investors as well as the transparency of the market, the ASF may request the publicly traded issuers to provide all necessary information regarding their activity on a regulated market.

The disclosure of the initial information is made through the Prospectus.

Furthermore, the listed company must inform the market about any material event that may influence the price of its shares within 48 hours from such occurrence.

Moreover, the listed company is required to provide information enabling the shareholders to exercise their rights with respect to the general meetings and voting rights, the payment of dividends, the issuance of new shares, and the capital increases.

Any listed company has reporting obligations to the ASF and the stock exchange regarding the financial status at the end of the fiscal year including any significant information enabling the investors to evaluate the activity of the company, including profit and losses. The listed company:

- (i) must file quarter, half-year and annual reports, which must be also published within maximum 5 days from their approval;
- (ii) must also disclose the audited results at the end of the fiscal year.

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The listed company has to inform the public, as well as the ASF with regard to any inside information which directly concerns the said listed company. Any delay in such disclosure must be notified to the ASF, which may require the listed company to immediately disclose the information in order to ensure the transparency and the integrity of the market.

A listed company whose shares are admitted to trading on a stock exchange in Romania or on the stock exchange of a Member State must ensure that similar information is made available to each of these exchanges.

When, as a result of a sale or a purchase of shares issued by a listed company, the voting right percentage of an investor exceeds or falls below 5%, 10%, 20%, 33%, 50%, 75% or 90% of the voting rights, that investor has to notify such positions to the issuer, the ASF, as well as to the stock exchange within maximum three business days.

### **SPECIAL PROVISIONS REGARDING LISTED COMPANIES**

The cumulative voting method is a procedure used in the election of the Board of Directors of a listed company if the number of Board Members is at least 5, or is requested by a significant shareholder. The significant shareholder is a shareholder who owns at least 10% of the issued capital of the company.

The extraordinary general meeting of shareholders of a listed company has the prerogative to decide upon any share capital increase. The share capital increase, in cash or in kind, must be approved at an extraordinary general meeting attended by at least 3/4 of the total number of the shareholders, by a vote of at least 75% of the voting rights.

Any sale, purchase, exchange, or guarantees involving fixed assets, which have a value exceeding 20% of the total of the fixed assets less receivables, or joint ventures with a duration of more than one year which involve fixed assets, which have a value exceeding 20% of the total of the fixed assets may be concluded by the company's Administrators or Directors only with the prior approval of the extraordinary general meeting of the shareholders.

By way of derogation from the provisions of Companies Law no. 31/1990, the identification of the shareholders entitled to receive dividends will be determined by the listed company within 10 business days after the general meeting of shareholders which approved the distribution of dividends. The respective general meeting must also set the payment date which should not exceed 6 months as of the date of the meeting which approved the distribution of dividends.

### **PUBLIC OFFERINGS**

Public offerings are regulated by the Capital Market Law as well as by rules provided by the ASF. All types of public offerings require prior authorization given by the ASF. Therefore, any advertising of such offerings before obtaining the above-mentioned authorization is prohibited.

Here are the main requirements concerning the *Public Sale Offers, and the Public Purchase Offers*:

- (i) The Public Sale Offer must be made through an intermediary authorized to provide investment services with prior publication of a prospectus approved by the ASF. The Public Purchase Offer is the offer to buy securities addressed to all holders by mass media or other means and it must also be made through an intermediary authorized to provide investment services.

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- (ii) The application for authorization must be accompanied by a Prospectus in case of a Public Sale Offer, or by a Purchase Offer in the case of a Public Purchase Offer. The above documents must provide information regarding the listed company, and the conditions of the offer.
- (iii) The Prospectus shall contain all information enabling investors to correctly assess the assets, liabilities, financial position, profit and loss as well as the provided guarantees. The Prospectus and the Purchase Offer must comply with the requirements of the ASF.
- (iv) The Prospectus, or the Purchase Offer and for a Purchase Offer is valid for the time period mentioned in the Prospectus.
- (v) Failure to obtain the approval of the Prospectus or of the Purchase Offer, or to comply with the conditions set forth in the approval decision renders the public offer void.
- (vi) The Prospectus for a Sale Public Offer is valid 12 months as of the date of publication, while the Purchase Offer is available only for the approved period. However if the offering announcement is not made within 10 business days as of the ASF approval, the Purchase Offer is cancelled.
- (vii) Once the announcement is published, the Offer becomes mandatory and it has to be made available to the public in the form and content approved by the ASF. The Sale or Purchase Offer is valid throughout the period set out in the announcement, but it may not exceed the time limit set out by the ASF.
- (viii) Any significant new event or the modification of the original information in the prospectus or offer document that occur during the validity term of the offering and affecting the investment decision has to be included in a supplement.

#### *Voluntary Takeover Offer*

The Voluntary Takeover Offer represents a purchase offer directed to all shareholders of a company by a person, who, together with his/her affiliates intends to acquire more than 33% of a listed company.

In respect thereof, the offeror has to send the ASF a preliminary announcement. After obtaining the approval from the ASF, the offeror must make the offer public by sending it to the subject of the takeover and publish it in one central and one local daily newspaper.

Within five days as of receiving the preliminary announcement of the Voluntary Takeover, the Board of Directors of the listed company must inform the ASF, and the stock exchange regarding their position. The Board of Directors of the listed company may also convene an extraordinary general meeting of the shareholders in order to inform them of the management position regarding the takeover offer.

After the receipt of the preliminary announcement, during the term of the offer, the Board of the listed company shall inform both the ASF and the stock exchange of all the transactions carried out by its members, and the executive management regarding the securities subject to the Voluntary Takeover Offer.

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Moreover, during the term of the offer, it is prohibited to enter into transactions, or take any measures which could affect the assets of the company, except for the current management activities.

Operations considered to affect the company's assets may include share capital increases, issuance of securities which grant subscription rights, transfer of assets representing at least one third of the net assets according to the yearly financial balance sheet, and measures which may affect the status of the classes of shares of the listed company.

The minimum price for the takeover offering is supposed to be at least the highest price among the following:

- (i) the highest price paid within 12 month prior to the voluntary takeover offer by the same offeror for shares of the same issuer;
- (ii) the weighted average market price for the said shares computed for the last 12 month prior to the offer, or
- (iii) at least the net asset value per share following the latest financial balance sheet.

The offeror cannot launch another offer for the shares of the listed company within one year from the closing of the takeover offering.

#### *Mandatory Takeover Offer*

The Capital Market Law also provides that the shareholder holding alone or together with other affiliates more than 33% of the voting rights of a company listed on the stock exchange must launch a Mandatory Takeover Offer. The Mandatory Takeover Offer must be made as soon as possible, without exceeding a 2-month term from reaching the 33% threshold.

Until the Mandatory Public Offer is made, all voting rights exceeding 33% are suspended, and the offeror cannot acquire any additional shares of the same company.

The minimum price offered has to be at least equal to the highest price paid by the offeror for the same shares within the 12 months prior to the launching of such offer.

In case such price calculation method cannot be applied, the minimum price for the Takeover Offer is supposed to be at least the highest price among the following:

- (i) the weighted average trading price in the last 12 months prior to the offer;
- (ii) the value of the company's net assets according to the last financial balance sheet;
- (iii) the value of the shares, following an expert report prepared by an independent auditor.

The public offer is no longer mandatory if the percent exceeding 33% of the voting rights is acquired as a result of an excepted transaction, such as a privatization process, share acquisition from the Ministry of Public Finance or from other entities, share transfer between the parent company and its subsidiaries, or between the subsidiaries of the same parent company, or a Voluntary Takeover Offer directed to all shareholders for all the shares of the listed company.

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### *Counteroffer*

Any counteroffer may be launched within 10 business days as of the publication of the announcement of the initial offer and it has to refer to the same amount of shares and target the same share capital. The price of the counter offer must be at least 5% higher than the price of the initial offer.

The ASF determines the criteria for selecting the winning bid. A tender is conducted by the ASF in order to select the winning offer. The price is increased with at least 5% over the highest price offered in a previous round until no other price increase offer is submitted.

If the majority shareholder holds more than 95% of the share capital or has acquired more than 90% of the shares targeted by the public purchase offer, it is entitled to ask the minority shareholders to sell their shares at a fair price.

On the other hand, a minority shareholder has the right to request the majority shareholder which has over 95% of the shares to buy its remaining shares at a fair price.

The fair price is considered to be the price offered in the voluntary or mandatory takeover offering, only if the offeror has exercised its right within 3 months from the closing of the said offer. Otherwise, the price shall be established by an independent expert in accordance with international valuation standards.

### **GREENHOUSE GAS EMISSION CERTIFICATES**

At the beginning of 2010, the ASF published the Approval Notice no. 10 of February 22, 2010 whereby it provided that the "greenhouse gas emission certificates" qualify as securities. Consequently, the trading of such certificates was regulated by the capital markets legislation. However, the said Approval Notice no. 10 of 2010 was suspended by the Bucharest Court of Appeals shortly after the issuance thereof, pursuant to a motion to suspend filed by one of the securities brokerage companies. Further on, the Bucharest Court of Appeals cancelled the said Approval Notice no. 10 of 2010, pursuant to an action for annulment filed by the same securities brokerage company.

The National ASF challenged this decision of the Bucharest Court of Appeals, by filing a recourse with the High Court of Cassation and Justice, on the docket of which the recourse case is currently pending.

Consequently, currently the greenhouse gas emission certificates are not considered as being securities. Therefore, they are traded as commodities, VAT being applicable to the transactions.

The greenhouse gas emission certificate is the title which confers the right to issue a ton of carbon dioxide equivalent during a defined period, according to the Government Decision no. 780 of 2006 regarding the Approval of the Trading Scheme of the Certificates for GHG Emission Allowances.

The transactions with greenhouse gas emission certificates, which are carried out by entities which are not operators of the installations, have to be performed through authorized brokers.

In order to trade such greenhouse gas emission certificates, all the parties involved in the transaction have to be registered with the Romanian Register of Greenhouse Gas Emission Certificates.

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## **9. ROMANIAN PUBLIC PROCUREMENT LAWS**

*Updated January 2018*

The relevant **Romanian public procurement laws and regulations** are:

- ✓ Law no. 98 of 2016 on Public Procurement ("**Public Procurement Law**"), as amended by Government Emergency Ordinance no. 107 of 2017 on the Amendment and Supplementation of Several Legal Norms having Impact on the Public Procurement Sector („**GEO no. 107**")
- ✓ Law no. 99 of 2016 on Sectorial Procurement ("**Sectorial Law**")
- ✓ Law no. 100 of 2016 on Works and Services Concessions ("**Concessions Law**")
- ✓ Law no. 101 of 2016 on Remedies and Appeals Concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints ("**Remedies Law**")

### **Public Procurement Law**

The provisions of the Public Procurement Law entered into effect as of May 26, 2016 and they will replace the provisions of the Government Emergency Ordinance no. 34 of 2006 regarding the Award of Public Contracts, Public Works Concession Contracts and Services Concession Contracts ("**GEO no. 34**") and any other contrary provisions stipulated by other legal norms.

The Public Procurement Laws implemented the European Directives 2014/23/EU regarding the Award of Concession Contracts, 2014/24/EU regarding Public Procurement and 2014/25/EU regarding Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

### **Types of procedures for the award of the public procurement contracts**

The Public Procurement Law implements the relevant EU Directives in the public procurement area, and regulates the specific procedures to be followed for the award of the public procurement contracts. The Public Procurement Law provides two new awarding procedures, i.e.:

- (i) Innovation partnership – enables the contracting authority to enter into a structured partnership with a bidder with the objective of developing an innovative product, service or works;
- (ii) Simplified procedure – may be applied by the contracting authority for the contracts with a reduced value.

The above procedures are in addition to the procedures below which were already provided for by the prior legislation, i.e.:

- (i) Open Public Tender – takes place in a single stage and any interested provider can submit a tender;
- (ii) Limited Public Tender – consists of two stages, and only the bidders selected by the contracting authority at the first stage will be invited to submit bids in the second stage;

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(iii) Competitive Negotiation – consists of two stages:

(1) the stage of filing the applications for participation to the tender, and of the selection of the short listed bidders by applying the qualification and selection criteria; and

(2) the stage of filing the official offers by the shortlisted bidders, the evaluation of the compliance of their bids with the minimal requirements established by the contracting authority, the negotiations for the purpose of improvement of the initial offers, the filing of the final offers, and the evaluation of the final offers by applying the award criteria and the evaluation factors.

(vi) Competitive Dialogue – any interested provider can submit a bid; the contracting authority may perform the dialogue only with the accepted candidates and only the candidates selected by the contracting authority from amongst the accepted candidates are invited to make the final offer;

(v) Tender for a Solution Project – allows the contracting authority to obtain a plan or a project which was selected by a jury on a competitive basis, especially in the territorial planning, urban, and zoning sectors.

The Concession Law regulates two awarding procedures: (i) open tender with a possibility to organize a negotiation phase and (ii) competitive dialogue.

As a rule, the contracting authority shall award a public procurement contract pursuant to an open or a limited public tender, in case the estimated value of the contract is equal or above the following thresholds:

- a. Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;
- b. Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;
- c. Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.

The other types of public procurement procedures, i.e. the Competitive Dialogue, and the Negotiation, may be used by the contracting authority only in the special cases provided for by the Public Procurement Law.

The contracting authority shall base the award of a public procurement contract which is awarded pursuant to an open or a limited public tender on the most economically advantageous offer.

In case of contracts in the sectors of water, energy, transport, postal services or other relevant activities, as defined by the Sectorial Law, a public procurement contract is usually awarded pursuant to an open, or limited public tender, or competitive negotiation, or competitive dialogue. In these sectors, the other above-mentioned procedures can be used by the contracting authorities when awarding a public procurement contract only under the specific circumstances provided by the Sectorial Law.

According to the provisions of Public Procurement Law, the contracting authority may procure products or services, without using an awarding procedure, if the value of the acquisition does not exceed the Lei 132,519, i.e. the equivalent of EUR 29,350, exclusive of VAT, for each acquisition. Also, the contracting authority may procure works without an awarding procedure, if the value of

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the acquisition does not exceed the Lei 441,730, i.e. the equivalent of EUR 97,832, exclusive of VAT, for each acquisition. In both the above-mentioned cases, the public procurement should be based on a Grounding Note.

The contracting authority is obliged to ensure the transparency of the public procurement process by publication of the Notices of Intent, the Participation Notices and the Award Notices according to the Public Procurement Law.

### **Notice of Intent**

The contracting authority may notify its intentions with regard to the scheduled procurements by publishing a Notice of Intent.

The Notice of Intent is published in the Official Journal of the European Union and at the national level in the Electronic System of Public Procurement ("**SEAP**").

### **Participation Notice**

The contracting authority must publish a Participation Notice in the following cases:

- (i) it launches procedures of Open, or Limited Public Tender, Competitive Dialogue, Competitive Negotiation, or Innovation Partnership in order to conclude a public procurement contract, or framework agreement; or
- (ii) it initiates an electronic purchasing system; or
- (iii) it organizes a Tender for a Solution Project; or
- (iv) it initiates the procedure regarding the award of public procurement contracts/framework agreements for social services and other specific services, except if a continuously valid Notice of Intent was published.

The Public Procurement Law provides that the Participation Notice shall be mandatorily published in the Official Journal of the European Union in case the value of the public procurement contract, or of the framework agreement is equal or above the following thresholds:

- a. Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;
- b. Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;
- c. Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.

*Note:*

*The above value thresholds are amended from time to time by the European Commission according to the appropriate rules and procedures provided by Art. 6 of EU Directive 2014/24/EU regarding Public Procurement.*

*The National Agency for Public Procurement ("**ANAP**"), publishes on its website the value thresholds established by the European Commission, at the date of the entry into force thereof according to the appropriate rules and procedures provided by Art. 6 of EU Directive 2014/24.*

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## **Joint Offers**

The contracting authority has the right to require the economic operators who jointly participate in the tender procedure, whose offer was declared winner to adopt or to establish a certain legal vehicle, provided that this aspect was provided in the Participation Notice and the award documentation and to extent to which this is necessary for the appropriate performance of the public procurement contract.

Without any derogation from its liability with regard to the manner of performance of the future public procurement contract, the bidder may include in the technical proposal the possibility to subcontract part of the works or services covered by the tendered contract.

At the request of the contracting authority, the bidder has the obligation to specify the works or services which will be subcontracted, and the contact details of the proposed subcontractors.

The contracting authority does not have the right to require the economic operators who jointly participate in the award procedure to adopt or to establish a certain legal vehicle for the filing of an offer or of an application for participation.

The contracting authority has the right to establish by the tender documentation, when necessary and justified for objective reasons, the manner in which the economic operators will fulfill the requirements regarding the economic and financial capacity and the technical and professional capacity in case they jointly participate in the award procedure, in compliance with the proportionality principle.

## **Foreign bidders**

The domestic and the foreign bidders are equally treated. The foreign bidders must submit the Romanian certified translation of the bidding documents.

In case that the documents to be submitted in a bid are issued or notarized in countries which did not conclude treaties with Romania for the waiving of the apostille formalities, such documents will also have to be apostilled.

## **Submission Deadlines**

The period between the date of the transmission of the participation note for publication in the Official Journal of the European Union, and the deadline for the filing of the offers is of at least 30/35 days, subject to the type of the tender procedure.

If the contracting authority published a note of intent within the procedures regarding open bid, limited bid and competition negotiation, with regard to the public procurement contract to be awarded, it has the right to reduce the period between the transmission of the participation note for publication in the Official Journal of the European Union and the deadline for the filing of the offers to at least 10/15 days if the following conditions are cumulatively met:

- (i) the Notice of Intent included all the information necessary for the Participation Notice, to the extent to which the respective information was available at the time of the publication of the Notice of Intent;
- (ii) the Notice of Intent was sent for publication with a period between 35 days and 12 months prior to the date of the transmission of the Participation Note.

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## **Selection Criteria**

The contracting authority has the right to apply within the award procedure only qualification and selection criteria relating to:

- a. reasons for the exclusion of the bidder;
- b. capacity of the bidder, i.e.:
  - (i) capacity of exercising the professional activity;
  - (ii) economic and financial status;
  - (iii) technical and professional capacity.

## **Award Notice**

The contracting authority shall issue an Award Notice to be published within 30 days, further to:

- (i) the award of the public procurement agreement, or the conclusion of the framework agreement following the completion of the award procedure;
- (ii) the completion of a tender for a solution by establishing the winning competitor;
- (iii) the completion of the tender procedure by the award of a public procurement agreement in case of a dynamic procurement procedure;
- (iv) the closing of a dynamic procurement system.

The Award Notice must be published in SEAP and in the Official Journal of the European Union.

## **Conclusion of the Public Procurement Agreement**

The contracting authority awards the public procurement contract/framework agreement to the bidder who submitted the most financially advantageous offer.

The contracting authority establishes the most financially advantageous offer based on the tender procedure and on the evaluation factors provided in the procurement documents.

In order to determine the most financially advantageous offer, the contracting authority has the right to apply one of the following award criteria:

- (i) lowest price;
- (ii) lowest cost;
- (iii) the best quality-price relation;
- (iv) the best quality-cost relation.

Public Procurement Law introduced the standard European Single Procurement Document (“**ESDP**”). ESDP is drafted based on a standard form approved by the European Commission and is provided exclusively in electronic format.

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The contracting authority may request the bidders to submit justifying documents as proof of the information included in ESDP, at any time during the course of the tender procedure, if this is deemed necessary in order to ensure compliance with the procedure.

If the economic operator proves that it fulfilled all the criteria regarding the economic and financial status or regarding the technical and professional capacity invoking the support of a third party, the relevant information ESDP must be also filled with by the supporting third party.

If the economic operator intends to subcontract parts the contract, the relevant information must be also filled in ESDP by the subcontractors.

An economic operator may reuse an ESDP already used in a previous award procedure, provided that it confirms that the information included in it is still correct and valid at the date of the filing thereof.

ANAP updates the full list of the databases that includes relevant information regarding the economic operators established in Romania in the Electronic System Implemented and Managed by the European Commission (“**E-Certis**”). E-Certis includes information regarding certificates and other supporting documents regularly requested by the contracting authorities in relation to the E-Certis tender procedure.

In order to facilitate the cross-border award procedures, ANAP makes sure that the information regarding the certificates and other forms of supporting documents uploaded in E-Certis are updated on a permanent basis.

The contracting authorities use E-Certis and mainly require those types of certificates or forms of supporting documents that are available in E-Certis.

### **Challenging of the award procedure**

Any competing bidder, including the foreign bidders, whose rights or interests were infringed by an action of a contracting authority, is entitled to challenge the respective action by filing a Complaint with the contracting authority. The procedure regarding this legal remedy is provided by Remedies Law. The Complaint must be filed with the contracting authority within:

- a. 10 days, starting with the day following the day when the act of the contracting authority considered unlawful was taken note of in case the estimated value of the contract is equal or above the following thresholds:
  - (i) Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;
  - (ii) Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;
  - (iii) Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.
- b. 5 days, starting with the day following the day when the act of the contracting authority considered unlawful was taken note of in case the estimated value of the public procurement or concession procedure is below the thresholds mentioned above.

The party who is not satisfied with the reply received to the Complaint filed with the contracting authority, or who did not receive any reply by the expiry of the legal 3-day deadline from the

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contracting authority, or who considers that it was harmed by the remedy measures taken by the contracting authority may notify the National Council for Solving Complaints (“**NCSC**”) in order:

- (i) for the act of the contracting authority to be annulled;
- (ii) to oblige the contracting authority to issue an act or to take remedy measures;
- (iii) for the claimed right or the legitimate interest to be acknowledged.

The Notification will be filed with NCSC within the 10-day or 5-day deadlines depending on the value of the procurement agreement.

NCSC examines the legality of the challenged act and can:

- a. issue a decision by which it fully or partly annuls it;
- b. orders the contracting authority to issue such an act;
- c. orders any other measure, in addition to the ones mentioned above, necessary in order to remedy the consequences of the act that affected the award procedure.

According to the Remedies Law, the Decisions of NCSC must be published in SEAP and on the website of NCSC. The decisions of NCSC may be challenged before the Administrative Litigation Section of the Court of Appeals of the jurisdiction where the contracting authority is located within 10 days as of the communication thereof. The court decision is final.

According to the provisions of the Remedies Law, the parties may agree on arbitration for the settlement of the disputes related to public procurement agreements.

The court, granting the complaint, will amend the NCSC decision, ordering according to the case:

- (i) the annulment in whole or in part of the act of the contracting authority;
- (ii) the issuance of the act by the contracting authority;
- (iii) the fulfillment of an obligation by the contracting authority, including the removal of any discriminatory technical, economic or financial specification in the Participation Notice, from the award documentation or from other documents issued in relation to the award procedure;
- (iv) any other measures necessary to remedy the violation of the legal provisions in the field of public procurement, sectorial procurement, or concessions.

The court may order the suspension of the award procedure and/or of the performance of the agreement until the settlement of the case under certain conditions and subject to the payment of a bond of 2% of the estimated value of the agreement, but no more than the values established by the Remedies Law.

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## 10. ROMANIAN COMPETITION LAWS

### 10.1 ECONOMIC CONCENTRATION

*Updated October 2016*

The relevant **Romanian competition laws and regulations** regarding economic concentrations are:

- ✓ Competition Law No. 21 of 1996, as amended (the “**Competition Law**”)
- ✓ Order no. 385 of 2010 regarding the Approval of the Application of the Regulation regarding the Economic Concentrations, as further amended (“**Regulation**”)
- ✓ Order no. 386 of 2010 regarding the Guidelines on the concepts of economic concentration, undertakings concerned, full-function joint-ventures and calculation of turnover
- ✓ European Union Council Regulation no. 139 of 2004 on the Control of Concentrations between Undertakings (“**Merger Regulation**”)

#### **Types of transactions considered as economic concentrations**

The Competition Law defines an economic concentration as merger of two or more companies, or by a company taking over the control of another independent company.

The authority controlling the economic concentration at the national level is the Competition Council. Its goal is to prevent the establishing of monopolies or companies/joint ventures with a dominant position on a certain market which can lead to a significant restriction, prevention, and distortion of the competition.

#### **Turnover thresholds**

The Competition Law provides that a merger notice has to be filed with the Competition Council if the following requirements regarding the turnover values in the calendar year preceding the transaction are cumulatively met:

- i) the combined turnover of the companies involved in the transaction exceeds the Lei equivalent of EUR 10,000,000, and
- ii) at least two of the companies involved in the transaction have each a turnover in Romania in excess of the Lei equivalent of EUR 4,000,000.

#### **Note:**

*The turnover thresholds mentioned above are calculated by taking into account the combined turnover of the entire group.*

*The turnover threshold should be calculated by taking into consideration the value of the total of the revenues obtained from the sale of products and/or rendering of services by the company*

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*during the last financial year, out of which the amounts owed as tax obligations and the accounting value of the exports performed directly or by proxy, including the intra-community deliveries, are subtracted.*

### **Notification of the Competition Council**

If the above thresholds are met, a Notification and supporting documentation must be filed prior to implementing the concentration.

The preparation of the Notification and of the related documentation is a laborious process, involving information and documentation from the parties involved in the transactions.

### **Decisions issued by the Competition Council**

Within forty-five (45) days from the date when the Notification becomes effective, i.e. the application together with all the supporting documents are filed with the Competition Council, the said authority may issue the following decisions:

- a) a decision of non-objection if, although the transaction represents an economic concentration:
  - (i) There are no serious doubts regarding the compatibility with a normal competitive environment.

OR

- (ii) There are no serious doubts regarding compatibility with a normal competitive environment, or such doubts were removed by the commitments proposed by the involved parties and accepted by the Competition Council. The Competition Council may establish by decision conditions and obligations that are likely to ensure the compliance by all the involved parties with the commitments they undertook in order to obtain the compatibility of the concentration with a normal competitive environment.
- b) a decision to start an investigation, if the transaction represents an economic concentration and there are doubts regarding the compatibility with a normal competitive environment and such doubts could not be removed according to the provisions under paragraph (a) ii above.

Within five (5) months as of the receipt of the full notification of an economic concentration for which the Competition Council decided to start an investigation, the Competition Council may issue:

- (i) a decision by which it will declare the economic concentration operation incompatible with a normal competitive environment, as it raises significant barriers against the actual competition on the Romanian market or on a substantial part thereof, especially as a result of the creation or consolidation of a dominant position;
- (ii) a decision for the authorization of the economic concentration if the economic concentration operation does not raise significant barriers against the actual competition on the Romanian market, or on a substantial part thereof, especially as a result of the creation or consolidation of a dominant position;

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- (iii) a decision for the conditional authorization of the economic concentration which will include certain conditions in order to ensure the compatibility of the economic concentration with a normal competitive environment.

If the Competition Council considers that the economic concentration does not meet the legal requirements, it will issue a letter in respect thereof within thirty (30) days from the date when the Notification became effective.

According to the Regulation, until the Competition Council issues a decision related to the approval of the economic concentration, the following actions cannot be implemented:

- (i) the entry of the acquired legal entity on another/new market;
- (ii) the exit of the acquired legal entity from the market where it carried out its operations;
- (iii) the changing of the scope of activity of the acquired legal entity;
- (iv) the exercising of the voting rights for the appointment of members in the executive management of the acquired legal entity;
- (v) the exercising of the voting rights for the approval of the income and expenses budget of the acquired legal entity;
- (vi) the exercising of the voting rights for the approval of the business plan of the acquired legal entity;
- (vii) the exercising of the voting rights for the approval of the investment plan of the acquired legal entity;
- (viii) the changing of the name of the acquired legal entity;
- (ix) the restructuring, closing, or splitting up of the acquired legal entity;
- (x) the sale of the assets of the acquired legal entity;
- (xi) the dismissal of the employees of the acquired legal entity;
- (xii) the conclusion or termination of long-term contracts or other important agreements signed with third parties;
- (xiii) the listing of the acquired legal entity on the stock market.

However, the law provides that by filing an application with the Competition Council, the parties may apply for derogation from the above rules. When granting the derogations, the Competition Council must take into consideration the effects of the suspension of the economic concentration, upon one or several of the economic agents involved in the operation, or upon third parties, or upon competitors.

### **Violations of the antitrust legal norms**

The breach of the provisions of the Competition Law regarding:

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- (i) the filing of the Notifications;
- (ii) the actions which cannot be taken prior to the issuance of a Decision by the Competition Council regarding the approval of the economic concentration; and
- (iii) the non-compliance with an obligation or a condition required by a Decision of the Competition Council in accordance with the law,

is punishable with a fine ranging from 0.5% to 10% of the turnover registered during the fiscal year prior to the transaction.

### **Economic Concentration on the European Union Community Market**

According to the Merger Regulation, an economic concentration has a Community dimension where:

- (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million, and
- (ii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The above conditions are cumulative.

A concentration that does not meet the above-mentioned thresholds has a Community dimension where:

- (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million;
- (ii) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (iii) in each of at least three Member States included for the purpose of item (ii), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (iv) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Also, in this second scenario, the above conditions are cumulative.

It is considered that an economic concentration exists regardless of the fact that the companies involved in the concentration have or do not have their registered offices or their main activity fields within the Community, provided that they conduct significant operations within the Community.

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If the annual turnover of the combined businesses exceeds the specified thresholds mentioned above in terms of global and European Union sales, the proposed transaction must be notified for review to the European Union Commission ("**EU Commission**").

The EU Commission may also examine mergers which are referred to by the national competition authorities of the Member States. This may take place upon a request of the national competition authority of a Member State, or of the merging companies. Under certain circumstances, the EU Commission may also refer a case to the national competition authority of a Member State.

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## Buzescu Ca>Romanian Business Law>Romanian Competition Laws

### 10.2 STATE AID

*Updated September 2015*

The relevant **competition laws and regulations** regarding the state aid are:

#### Domestic Regulations

- ✓ Government Emergency Ordinance no. 77 of 2014 regarding the National Procedures regarding the State Aid, as well as the amendment and the supplementation of the Competition Law no. 21 of 1996 as subsequently amended („**Emergency Government Ordinance no. 77**”)
- ✓ Government Decision no. 437 of 2015 regarding the Approval Procedure and the Content of the Memorandum provided by Art. 7 of the Emergency Government Ordinance no. 77
- ✓ Regulation of the Competition Council of June 20, 2007 regarding the State Aid Monitoring Procedures
- ✓ Regulation of the Competition Council of June 13, 2005 regarding the State Aid Register
- ✓ Government Decision no. 651 of 2006 regarding the Approval of the State Aid Policy for the period 2007 - 2013
- ✓ Government Decision no. 98 of 2010 regarding the Establishing of the Interministry Council the "Council for the Application of the State Aid Policy"

#### European Union Regulations

- ✓ Treaty for the Functioning of the European Union („**EC Treaty**”)
- ✓ Council Regulation (EC) no. 659 of 1999 laying down detailed rules for the application of Article 93 of the EC Treaty
- ✓ Council Regulation (EC) no. 794 of 2004 implementing Council Regulation (EC) no 659 of 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty
- ✓ Council Regulation (EC) no. 994 of 1998 on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid
- ✓ Commission Notice of May 22, 2005 on the determination of the applicable rules for the assessment of unlawful State Aid
- ✓ Commission Notice of November 15, 2007 towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State Aid
- ✓ Commission Notice of April 9, 2009 on the enforcement of State aid law by national courts

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- ✓ Regulation (EEC, Euratom) no. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

### **Measures considered as state aid**

According to the EC Treaty, the regulations regarding state aid only apply to the measures which fulfill cumulatively all the criteria mentioned below:

a. State resources transfer

The regulations regarding state aid concern the aid granted by the State or the transfer of state resources (including from national, regional and local authorities, banks and public foundations, public or private intermediary body assigned by the state).

The financial transfers representing state aid can be under, but not limited to the following form:

- (i) subsidies, or reduction of the interest;
- (ii) loans guarantees;
- (iii) provisions related to the accelerated depreciation method;
- (iv) capital injections;
- (v) tax exemptions.

b. Economic Advantage

The state aid must materialize in a certain economic advantage otherwise unavailable to the beneficiary in the normal course of business.

c. Selectivity

The state aid must be selective, favoring certain companies or the production of certain goods, thus affecting the balance between companies and their competitors. The "selectivity" is the criterion that differentiates the state aid from the "general measures", namely the measures which apply to all companies from all economic sectors of a Member State (for instance, the tax measures of general applicability).

A scheme is considered "selective" if the authorities managing it enjoy a certain discretionary power. The selectivity criterion is also fulfilled if the scheme applies only to a part of the territory of a Member State.

d. Effect on the competition and trade

The state aid must distort or threaten to distort the competition and the trade between the Member States.

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## **State aid notification procedure**

Given that state aid can distort competition by favoring certain companies over others, EU regulations provide strict control of state aid measures.

EU legislation regarding the state aid is directly applicable in Romania and the competences to authorize state aid were transferred from the Competition Council to the European Commission.

The state aid subject to the notification obligation cannot be granted unless approved by the European Commission or after it is considered to have been authorized.

The notifications of state aid measures shall be submitted by the applicant to the Competition Council. This authority will issue an opinion on compliance, accurateness and fulfillment of the obligations under the EU legislation regarding a state aid scheme within at most 30 days as of the receipt of the notice, unless the applicant requests in writing an extension of the deadline for filling additional information.

In the event that the Competition Council's opinion does not propose any changes, after sending the opinion to the applicant, the Competition Council must forward the notice or the relevant information to the European Commission.

The Competition Council assists in the preparation of notices or reports submitted to the European Commission, working with state aid providers to develop regulations establishing schemes or individual state aid. It also ensures the dissemination of the EU legislation and of the experience of the inspectors of the Competition Council regarding state aid, constantly monitoring both the legal framework for state aid and the compliance with its own decisions or the decisions issued by the European Commission in this area.

## **Investigation of the state aid by the European Commission**

The main role of the European Commission is to examine and decide what measures may be considered as state aid. Therefore, the Commission, i.e. DG Competition, has extensive powers to monitor, control and restrict the methods and levels of the aid granted by the Member States.

The European Commission must make decisions on the Notices under review within two months as of the date when the notice is deemed complete. The Commission may extend the deadline if additional information is required (the two-months period begins to run only when the documentation is complete). At the end of the two-month period, the Commission may decide to approve the aid or to open a formal investigation. The formal investigation may take up to few years.

If the European Commission has doubts as to the compatibility of an aid scheme/individual aid that was notified or brought to its knowledge through a complaint, an investigation is required to be started. This is a fairly long procedure that can last up to 18 months in the cases regarding the notified aid and, even more, for those which are not notified.

In the first phase, the Commission will send a letter to the Member State mentioning its concerns related to the alleged state aid case. The Member State has at most 30 working days to respond. The third parties (including competitors and other Member States) may send comments, usually within a period of one month. The Member State has one month to

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respond to the comments of the third parties. Further on, the European Commission shall review the information and may decide to organize bilateral meetings with the parties involved. At the end of the procedure, the European Commission may decide that state aid measures are not involved, and that the aid is compatible (possibly conditioned) or that the aid is incompatible. If the incompatible aid has already been granted, its recovery may be requested. At this point, the procedure before the European Commission will be closed.

### **Recovery of the unlawful state aid**

Unauthorized state aid is considered unlawful. Consequences of granting such aid are:

- (i) payment of the aid may be suspended;
- (ii) companies receiving unlawful state aid will have to reimburse such aid with the related interest due as of the date of payment until the date of recovery or reimbursement;
- (iii) change of the state's economic policies and legislation; or
- (iv) the beneficiaries and the granting authority can be sued by competitors for damages.

The state aid beneficiary is obliged to refund the amount equivalent to state aid if the recovery was ordered by the Commission, unless the implementation of the European Commission's decision was suspended, in accordance with the EU rules.

The Competition Council shall forthwith send to the state aid provider a copy of the European Commission decision whereby the recovery of the unlawful state aid or the abusively used aid was ordered. Further on, the state aid provider must immediately send a copy of the decision of the European Commission to the beneficiary.

If the beneficiary does not reimburse the state aid to the provider, the latter may file an application with the Bucharest Court of Appeals requesting the recovery of the respective state aid and the payment of related interest.

The decision of the Court of Appeals is subject to appeal. The appeal is heard before the High Court of Cassation and Justice.

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## 11. ROMANIAN LABOUR LAWS

*Updated September 2015*

The relevant **Romanian labour laws** are:

- ✓ **Labour Code**, approved by the Law no. 53 of 2003 (“**Labor Code**”)
- ✓ Law no. 62 of 2011 Regarding the Social Dialogue (“**Law no. 62**”)
- ✓ Law no. 67 of 2006 Regarding the Employees’ Protection in Case of the Transfer of Undertakings (“**TUPE Law**”)

### **General Terms and Conditions of Employment**

The standard terms of the employment are provided by the Labour Code.

The Romanian labour laws require the mandatory filing with the Employees’ Registry, i.e. REVISAL of a Standard Employment Agreement in Romanian language. This is a 3-page form issued by the Ministry of Labour.

In practice, the employers supplement the provisions of the Standard Employment Agreement with an Annex. Such Annex includes detailed rights and obligations of the parties to the employment agreement.

A Job Description must be appended to the Standard Employment Agreement as well.

The Standard Employment Agreement has to be registered with the Employees’ Registry, a day prior to the starting date of the execution of the employment agreement.

The Labour Code provides that the employment agreement shall not include provisions which would diminish the employee's rights below the minimum levels established by the relevant legislation.

Any document regarding the execution of an employment agreement has to be registered with the Employees’ Register one day prior to the starting date of the employment.

An employment agreement shall be concluded after a prior verification of the professional and personal skills of the person applying for employment. Also, a person may only be employed on the basis of a medical certificate, attesting that the concerned person is able to perform the respective activity.

### **Types of employment agreements**

Usually, the employer and the employee conclude an employment agreement for an undetermined period of time.

However, the Labour Code also provides for other types of employment agreements, such as:

- a. *The employment agreement for a determined period of time*

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This type of agreement is an exception and is concluded in the specific situations expressly provided by the Labour Code. An employment agreement for a limited duration may not be concluded for a period exceeding 36 months.

*b. The part-time employment agreement*

The part-time employment agreement must provide for:

- (i) the working hours schedule, which must be shorter than the regular working schedule of 8 hours/day and 40 hours/week;
- (ii) the conditions under which the working schedule can be amended;
- (iii) the prohibition to work overtime.

*c. The temporary employment agreement*

This type of employment agreement is concluded between the temporary employment agent and the employee, for one or more employment missions which will be performed by such employee for a beneficiary. Usually, the companies providing Human Resources services are also authorized as temporary employment agents.

The temporary employment agreement states the conditions under which the employment mission is to be carried out, the duration of the mission, the identity and offices of the beneficiary, as well as the remuneration methods for the temporary employee.

**Trial period**

The parties may also agree with regard to a trial period of maximum 90 calendar days for regular employees, and 120 calendar days for management employees.

However, such a trial period is not mandatory, but in case the parties agree upon it, only 1 (one) trial period can be established.

Throughout the trial period or at the end of it, the employment agreement may be terminated, based on a written notice at the initiative of either party.

**Working hours and working time schedule**

The regular working schedule is of 8 hours/day and 40 hours/week. Usually, the working hours are distributed uniformly, 8 hours/day, 5 days a week with 2 rest days.

The maximum legal duration of the working time cannot exceed 48 hours per week, including overtime.

By way of exception, the duration of the working time including overtime can be extended over 48 hours per week, provided that the average of the number of working hours, calculated for a reference period of 4 calendar months, shall not exceed 48 hours per week.

Also, with regard to certain activities or professions established by the applicable collective employment agreement, reference periods exceeding 4 months can be negotiated by the said collective employment agreement, but these periods cannot exceed 6 months. The former

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regulations provide the possibility to establish reference periods exceeding 3 calendar months, but which could not exceed 12 months.

Subject to the compliance with the regulations regarding the labour health and safety protection of the employees, in cases of objective, technical or operational reasons, the collective employment agreements can provide exceptions from the duration of the reference periods established above, but such exceptional reference periods cannot exceed 12 months.

### **Salary and extra earnings**

The salary is freely negotiated between the employer and the employee, and includes the basic salary, indemnifications, bonuses, as well as other additional payments.

The salary level is based on individual or collective negotiations and the employer may not negotiate and establish the minimum salary level below the minimum national gross salary.

The minimum gross salary is provided by Government Decision and it is of mandatory application at national level.

According to the provisions of the Labour Code, the employees shall receive indemnities for overtime, night work, bonuses for non-compete and mobility clause and allowances for domestic or foreign business trips.

Besides bonuses, indemnities and allowances established by the relevant legal norms, the employers may grant additional payments for exceptional results on specific projects.

### **Termination of Employment Agreements**

The termination of the employment agreements may occur for reasons pertaining to the employee's fault or for reasons independent of such fault.

#### *a. Termination due to employee's fault*

The employer may decide the employee's dismissal for reasons imputable to the employee in the following cases:

- (i) If the employee committed a severe violation or repeated violations of the Labour discipline, or of the rules established by the employment agreement, the CEA or the internal regulations, such as the Code of Internal Conduct.

According to the Labour Code, the employer must issue the Code of Internal Conduct. The Labour Code further provides that such Code should include rules applicable to all employees regarding work safety, non-discrimination, proper behavior at the work place, procedures regarding employees' requests and complaints, work discipline, violations and sanctions, disciplinary procedure, and rules related to the rights and obligations of the employer and employees, or other specific legal or contractual matters.

In case of disciplinary dismissal, the employee may be dismissed only after a prior disciplinary inquiry carried out in accordance with the provisions of the Labour Code.

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Failure to conduct the disciplinary inquiry in compliance with the provisions of the Labour Code will result in the annulment by the court of the decision of termination of the employment agreement.

- (ii) If the employee is in police custody for more than 30 days.
- (iii) If the employee has a physical or psychological disability confirmed by a certificate issued by the relevant authorities.
- (iv) If the employee is professionally unfit for the job.
- (v) If the employee fulfills the legal requirements, and the employee did not apply for retirement.

*b. Termination due to reasons independent of the employees' fault*

Usually, this type of termination is caused by the elimination of the employee's position due to reason(s) which does/do not pertain to employee's fault.

Such reasons may be:

- economical difficulties;
- technological changes; or
- reorganization of the employer's activities.

This procedure requires the preparation by the management of an adequate documentation in support of the decision for the termination of the employment agreement.

*Prior Notices*

The dismissed employees will receive, as a rule, a prior dismissal notice of minimum 20 business days.

In case of disciplinary termination or in case the employees are on trial, the employers do not have to issue a 20-day prior notice regarding the termination.

The employees in management positions usually negotiate a longer prior-notice term in the employment agreement.

*Severance Payment*

The employees dismissed due to the reasons not pertaining to the employees' fault are entitled to the payment of a severance payment, as per the provisions of the collective employment agreement applicable at the company level, as the case may be.

The employees in management positions usually negotiate severance packages when concluding individual employment agreements.

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### *Employees on leave during the dismissal process*

The Labour Code provides certain cases when the employees may not be dismissed:

- during the employee's temporary working incapacity (sick leave);
- during pregnancy and maternity leave;
- during the leave for child care up to the age of 2 or for disabled child up to the age of 3;
- during the leave for taking care of a sick child up to the age of 7 or for disabled child having common illnesses until the age of 18;
- during military service;
- during the exercise of an eligible function within a union body, unless the dismissal is decided for a serious misconduct or for repeated misconducts, committed by that employee;
- during annual paid leave.

The employers cannot issue Termination Decisions during these leave periods, and if such decisions are still issued, they are null and void.

### **Collective Employment Agreements**

If the employer has at least 21 employees, a Collective Employment Agreement for all the employees needs to be negotiated and concluded, in accordance with the provisions of the Law no. 62.

The standard terms of employment are those provided by the Collective Employment Agreement entered into by the employer on one side and the employees on the other side, who may be represented during the negotiation by the Trade Union or the Employees Representatives. It must be also noted that, pursuant to the provisions of Law no. 62, a Collective Employment Agreement applies to all the employees of a company, irrespective of the fact that they are union members or not.

### **Labour Disputes**

The Labour disputes are settled by a special section of the competent Tribunal. The labor disputes are exempted from court and stamp fees.

Labour litigation in the courts of first instance may take 6 (six) months or more depending on the complexity of the case, witness appearances, and discovery proceedings.

Law no. 62 provides that an appeal against the decision issued by the court of first instance may be filed within a 10-day term from the date of the receipt of the court decision by the appellant.

The service of process is done by the court, which mails the summons for the initial hearing to the parties.

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A termination procedure which did not comply with the legal provisions is annulable. In such case, the court will decide the annulment of the termination, and will compel the employer to re-hire the employee, and to pay damages equal to the total compensation to which the employee would have been entitled for the period that he/she was out of work.

## **TUPE Law**

The employees' protection in case of the transfer of undertakings is regulated by the Labour Code and by TUPE Law.

The provisions of the mentioned regulations need to be complied with when an Employer transfers its business or part of it to another Employer.

Pursuant to the provisions of TUPE Law, both the Transferor and the Transferee have to inform in writing the Employees' Representatives or the relevant Trade Union 30-days before the effective date of the transfer with regard to the following:

- i. the fact that a relevant transfer is to take place, the proposed date of the transfer, and the reasons for such transfer;
- ii. the legal, economic and social consequences of the transfer;
- iii. if any measures in relation to the transferred employees are to be taken;
- iv. the conditions of employment.

The rights and obligations of the Transferor, arising from an employment agreement existing at the date of the transfer, shall be entirely transferred to the Transferee.

Pursuant to the relevant legal provisions, the transferred employees cannot be granted rights that are inferior to those they had under the current employment agreement.

According to the TUPE Law, the transferred employees may not be dismissed for reasons due to or in relation to the transfer of undertaking.

Failure by the Transferor and Transferee to comply with the obligations provided in this Law is considered a violation and is punishable by fines.

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## 12. ROMANIAN DATA PROTECTION LEGAL REGIME

*Updated October 2018*

The relevant **Romanian data protection laws** are:

- ✓ European Regulation no. 679 of 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which repealed Directive 95/46/EC ("**GDPR**"), will take effect and will become directly applicable in Romania
- ✓ Guidelines issued by the National Authority for the Supervision of Personal Data Processing (the "DPA") on September 21, 2017 with regard to the implementation of the GDPR
- ✓ Various Guidelines issued by Article 29 - Data Protection Working Party on data processing at work (of June 8, 2017), on automated individual decision-making and profiling for the purpose of the GDPR (of October 3, 2017), on personal data breach (of October 3, 2017), on consent (November 28, 2017), on transparency, on data protection impact assessment (DPIA) of April 4, 2017

### **Applicability of the GDPR**

The GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in EU, regardless of whether the processing takes place in EU or not.

Also, the GDPR applies to the processing of personal data:

- a. of data subjects who are in EU, by a controller or processor which is not established in EU, where the processing activities are related to: (i) the offering of goods or services, irrespective of whether a payment by the data subject is required; or (ii) the monitoring of the data subjects' behavior as far as their behavior takes place within EU.
- b. by a controller not established in EU, but in a place where Member State law applies by virtue of public international law.

Thus, the GDPR has an extended jurisdiction since it applies to all companies processing the personal data of data subjects residing in EU, regardless of the company's location.

In case the data controller is not registered in EU, the data controller must designate in writing a representative based in EU.

### **Novelties brought by the GDPR**

*Consent of the data subject*

GDPR provides the following rules in relation to the consent of the data subject:

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- Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to the processing of his or her personal data.
- If the data subject's consent is given in the context of a written declaration which also concerns other matters (for example, it is included in the employment contract or in an addendum to the employment contract), the request for consent shall be presented in a manner which is clearly distinguishable from the other matters.
- The data subject has the right to withdraw his or her consent at any time and such withdrawal should be as easy as giving the consent. Prior to giving consent, the data subject shall be informed that he/she can withdraw his/her consent at any time.
- When assessing whether the consent is freely given, utmost account shall be taken of whether the performance of a contract is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

#### *Rights of the data subject*

GDPR provides new rights for the data subjects in addition to the existing rights. Thus, the data subjects have the following new rights:

- Right to deletion from the database ('right to be forgotten');
- Right to restriction of processing;
- Right to data portability.

#### **Data Controllers & Processors**

The GDPR defines the data controller as the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

*JOINT CONTROLLERS. In case two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall determine their respective responsibilities for compliance with the obligations under the GDPR, by means of an agreement between them.*

One of the key changes brought by the GDPR is that data processors have direct obligations such as:

- To implement appropriate technical and organizational measures in order to ensure and to be able to demonstrate that processing is performed in accordance with the GDPR.
- To implement appropriate technical and organizational measures, such as pseudonymization, which are designed to implement data-protection principles, such as data minimization, in an effective manner and to integrate the necessary safeguards into the processing.

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- To implement appropriate technical and organizational measures for ensuring that only personal data which are necessary for each specific purpose of the processing are processed.
- To maintain records of the processing activities.

### **Notification of the Data Processing**

Another key change brought by the GDPR is the removal of the general requirement for the data controller of filling a Notification with the relevant data protection authority regarding specific processing of the personal data. Thus, as per the press release posted on the DPA's website on May 17, the DPA officially advised that the data controllers will no longer be required to file Notifications as of May 25.

Under GDPR, the key responsibility of a data controller is to be accountable, i.e. to take actions in line with GDPR, and to be able to explain the compliance with GDPR to the data subjects and the DPA, as and when required.

### **The compliance with the GDPR provisions**

The following steps that must be taken by a compliant company:

#### **1. To identify all the data processing operations carried out by the company and keep records of the processing activities**

The companies with more than 250 employees have the obligation to keep records of the data processing. Small businesses employing fewer than 250 employees are exempt from these records keeping requirements unless their processing activities are risky, frequent or include sensitive personal data.

The records must provide among others:

(i) The categories of data which are processed.

As a general rule, the GDPR provides that the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, and data concerning a natural person's sex life or sexual orientation shall be prohibited.

The processing of personal data relating to criminal convictions and offences or related security measures based on the consent shall be carried out only under the control of official authority, or when the processing is authorized by EU or Member State law providing appropriate safeguards for the rights and freedoms of data subjects.

(ii) The legal basis for the processing purposes.

(iii) The location of the data storage system and of the data recipients.

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(iv) The states where the personal data are transferred and the time limits for the keeping of the personal data:

As a general rule, transfers to third countries, i.e. outside EU, can be carried out on the basis of an adequacy decision, or based on appropriate safeguards. In the absence of an adequacy decision, or of appropriate safeguards, a transfer of personal data to a third country can take place only in certain conditions, among which:

- the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
- the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;
- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject, between the controller and another natural or legal person.

The transfer of personal data outside the country is no longer the object of a Notification to the DPA.

(v) The security measures taken by the company.

The companies must implement Security Policies mentioning the security measures taken in accordance with the GDPR provisions.

## **2. To carry out a Data Privacy Impact Assessment (“DPIA”)**

The companies must carry out a DPIA where new personal data processing involves the “systematic and extensive evaluation” of individuals resulting in legal effects, or significantly affects those individuals.

Under the GDPR, the data controller/processor must not only comply with the general principles provided by GDPR, but also be able to prove such compliance. If the data controller is carrying out “high risk” processing, it must carry out a DPIA and, in some cases, consult the DPA.

A DPIA is mandatory if the processing operation is “likely to result in a high risk to the rights and freedoms of natural persons”. When determining whether data processing is likely to result in a high risk, the Guidelines issued by Art. 29 - Working Party on April 2017 provide the criteria that must be taken into consideration.

The Guidelines provide that processing operations meeting at least two of these criteria will require a DPIA. However, a processing operation meeting only one criterion may require a DPIA depending on the circumstance. Art. 29 - Guidelines also recommend using a DPIA when a processing operation is using new data processing technology.

In case a DPIA indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk, the data controller must consult the DPA.

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### **3. To appoint a Data Protection Officer (DPO)**

GDPR provides that the private entities, irrespective of their size and their capacity (data controller or data processor), must appoint a DPO if such:

- are involved in regular and systematic monitoring of data subjects on a large scale; or
- conduct large-scale processing of special categories of personal data, like that which details race or ethnicity or religious beliefs.

According to the Guidelines posted on the website of the Romanian DPA [http://www.dataprotection.ro/index.jsp?page=Lansare\\_Ghid\\_aplicare\\_RGPD&lang=ro](http://www.dataprotection.ro/index.jsp?page=Lansare_Ghid_aplicare_RGPD&lang=ro) on September 21, 2017, the DPA's recommendation for private entities is to appoint a DPO even if such appointment is not mandatory under GDPR.

*DPO's responsibilities:*

- informing the company's management and its employees on the GDPR's compliance requirements;
- training staff involved in data processing;
- conducting audits to ensure compliance and address potential issues proactively;
- serving as the point of contact between the company and the DPA;
- maintaining comprehensive records of all data processing activities conducted by the company;
- interfacing with data subjects to inform them about how their data are being used, their rights to have their personal data deleted, and what measures the company has put in place to protect their personal information.

### **4. To update the Notices of Information and the Privacy Policies**

The Notices of Information and the Privacy Policies must be updated in order to provide the legal basis based on which the data are processed and all the data subjects' rights provided by the GDPR.

### **5. To inform the DPA and the data subjects regarding any breach of the security of the personal data in accordance with the provisions of Art. 33 and Art. 34 of GDPR**

In case that the security breach causes serious risks for the individuals' rights and freedoms, the data controller has the obligation to file a Breach Notification with the DPA. The breach must be notified to the DPA within 72 hours after the data controller becomes aware of it. A template of the Breach Notification is posted on DPA's website. The DPA's Decision no. 128 of 2018 requires the data controller to sign the Breach Notifications with electronic signature, and file it electronically.

According to Article 34 of the GDPR, when the personal data breach is likely to result in a high risk regarding the rights and freedoms of natural persons, such breach must be also immediately notified to the affected data subjects.

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## **The sanctions for the breach of GDPR**

GDPR sets higher fines in case of breach of its provisions than those provided by the previous data protection legislation, i.e. fines of up to EUR 20 million or 4% of the annual worldwide turnover can be applied to data controllers for breaching the provision of the said regulation.

## **Implementation of GDPR in Romania**

The Law no. 190 of 2018 on the Measures for the Application of the GDPR (“**Law no. 190**”) provides the rules for the implementation at national level of the GDPR.

Given that the GDPR provides Member States with the possibility to adopt further exemptions, derogations, conditions, or rules in relation to specific processing activities, the Law no. 190 includes provisions regarding the following matters:

- (i) The processing of the personal data in the employment context in case electronic or video surveillance systems are used by the employer at the working place.  
  
This type of processing can be done subject to the additional conditions provided by Law no. 190, including the consultation with the Trade Union/Employees’ Representatives.
- (ii) The processing of the personal identification numbers of the natural persons in relation to the legitimate interest of the data controller. The processing can be done by ensuring additional safeguards, including the appointment of a DPO.
- (iii) The processing of health data for an automated decision-making purpose or profiling is permitted only with the explicit consent of the data subject.

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### 13. SUPPLEMENTARY PROTECTION CERTIFICATE (DRUG PATENT) (“SPC”)

*Updated September 2015*

The relevant **Romanian patent law and regulation**, and European Council regulations are:

- ✓ Law no. 64 of 1991 regarding Patents
- ✓ The Instruction no. 146 of December 28, 2006 issued by the State Office for Inventions and Trademarks (“**OSIM**”) Concerning the Supplementary Protection Certificate for Drugs and the Supplementary Protection Certificate for Plant Protection Products (“**Instruction 146**”), as amended
- ✓ Council Regulation (EEC) no. 469/2009 of May 6, 2009 Concerning the Creation of a Supplementary Protection Certificate for Medicinal Products (“**Regulation 469/2009**”), repealing Council Regulation (EEC) 1768/92
- ✓ Regulation (EC) no. 1610/96 of the European Parliament and of the Council of July 23, 1996 Concerning the Creation of a Supplementary Protection Certificate for Plant Protection Products
- ✓ Order no. 23 of 2012 on the Approval of the Instructions Regarding the Extension of the Duration of the SPC

#### **Requirements for the granting of an SPC in Romania**

##### Requirements under the Regulation no. 469/2009

According to the provisions of the consolidated version of the Regulation 469/2009, an SPC may be granted in case of a patented drug in Romania, if two cumulative conditions are met:

- (i) the respective drug is protected by a valid patent;
- (ii) the first marketing authorization for the respective drug was granted after January 1, 2000.

The Regulation no. 469/2009 further provides that the possibility for applying for a certificate shall be open for a period of six months starting no later than the date of accession of Romania to European Union in case that the six-month term for filing the SPC application, calculated from the date when the authorization to put the product on market was granted, expired.

According to the provisions of Regulation no. 469/2009, apart from the specific requirements mentioned above, the SPC will be granted if, at the date of filing the application:

- a. a valid authorization to place the drug on the market as a medicinal product granted in accordance with the Directive 2001/83/CE or the Directive 2001/82/CE is in effect;
- b. an SPC was not previously issued for the respective drug;

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- c. the marketing authorization referred to at item (a) above is the first authorization to place the drug on the market as a medicinal product.

Requirements under the Instruction 146

According to the Instruction 146, the SPC application has to fulfill the following requirements:

- (i) the application was submitted within the time limits stipulated in Regulation no. 469/2009;
- (ii) the Romanian Patent Office, i.e. OSIM must determine if the application was submitted within the 6-month period from Romania's accession to the EU, for drugs and plant protection products, respectively, with regard to which the first authorization to place the product on the market as a drug or a plant protection product in Romania was obtained after January 1, 2000;
- (iii) the application is accompanied by a copy of the valid authorization to place the drug on the market in Romania;
- (iv) the application contains, where necessary, information relating to the first authorization to place the drug on the market, in EEA, and a copy of the authorization published in an appropriate official publication;
- (v) the basic drug patent is in force on the date of filing the application;
- (vi) the applicant for the issuance of an SPC is the same entity as the initial patent holder – in case of a change of patent holder the relevant transfer documentation must be submitted as well.

The Instruction 146 issued by OSIM provides that an SPC application must be filed, *inter alia*, together with a copy of the Marketing Authorization for the respective drug in effect at the date of filing the application.

According to the above-mentioned Instruction, the Marketing Authorization for Romania is:

- a. an authorization valid in Romania for drugs for human use issued by the National Drug Agency, according to Law no. 95 of 2006 regarding the Health Reform;
- b. an authorization valid in Romania for drugs for veterinary use issued by the Sanitary-Veterinary and Food Safety National Authority;
- c. an authorization for a drug for human or veterinary use, valid in Romania, issued by the European Medicines Agency (“**EMA**”);
- d. a homologation certificate of the plants protection products issued by the Inter-Ministry Commission for the Homologation of the Plants Protection Products.

**Effects of the granting of an SPC**

According to the provisions of Regulation no. 469/2009, the SPC has the same effects as the base patent, subject to the provisions of the said Regulation, i.e. only for the drug covered by the Marketing Authorization filed for the granting of the SPC. The SPC, if granted, produces its effects from the date of the expiry of the base patent up to the date of expiry of the SPC.

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According to the Patent Law no. 64 of 1991 as amended (“Patent Law”), the patent confers to its owner an exclusive right of exploitation throughout its entire duration. Also, the manufacturing, using, offering for sale, or selling of a product protected by a patent without the consent of the patent owner is prohibited.

According to the Patent Law, the infringement of the patent rights is considered counterfeiting, which is a criminal offence, punishable with imprisonment for a period ranging from 3 months up to 2 years, or by a fine ranging from Lei 10,000 up to Lei 30,000, i.e. around EUR 2,800 up to EUR 8,220.

### **Exceptions**

By way of exception, the actions mentioned above, which were carried out before the publication of the patent application, or before receiving a cease and desist notice from the applicant for a patent with a certified copy of the drug patent application appended, or an SPC with a certified copy of the SPC application appended, are not considered to be infringements.

According to the Patent Law, *inter alia*, the following are not considered an infringement of the rights conferred by the patent mentioned:

- (i) if the activities prohibited by the Patent Law are carried out in private and not for a commercial purpose; the production or, as the case may be, the use of the invention are carried out exclusively for private use and not for commercial purpose.
- (ii) the use for experimental/testing purposes, exclusively with non commercial purpose, of the object of the patent.

Also, the Regulation for the Application of the Patent Law provides that conducting tests and required studies for the purpose of obtaining the authorization to put on the market a drug, as well as the practical requirements which results from such test and studies are not considered being an infringement of the rights provided for by the Patent Law.

### Test batches

The Romanian legislation regarding drugs does not provide any regulations regarding pilot batches. However, according to the representatives of the National Drug Agency, the Guidelines issued by EMEA also apply in Romania starting with January 1, 2007, i.e. the date of accession of Romania to EU.

Test batches may be regarded as being part of the practical requirements for the obtaining the marketing authorization. Therefore, the production of the validation/test/pilot batches may not be considered as an infringement of the rights conferred by the patent/SPC.

Thus, according to the Note for Guidance on Process Validation issued by the EMEA, the size of the pilot batch should be of to at least 10% of the production scale batch, i.e. provided that the multiplication factor for the higher sized of the pilot batch does not exceed 10.

Also, for oral solid dosage forms this size should generally be of 10% of the production scale, or 100,000 units, whichever is higher.

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## **Publication of the Decisions regarding the SPC**

The SPC application, together with a brief mention on the decision of OSIM with regard to the granting or dismissal of the SPC application is published in the Romanian Official Bulletin of Intellectual Property (“**BOPI**”) – SPC Section.

Also, OSIM makes available at its offices the copy of the Marketing Authorization on which the SPC is based, for consultation by the public.

## **Protection of the rights conferred by an SPC**

The owner of an SPC may take the following actions in order to enforce the intellectual property rights conferred by the SPC.

### *Criminal investigation*

According to the Patent Law, the infringement of the patent rights is considered counterfeiting, which is a criminal offence, punishable with imprisonment for a period ranging from 3 months up to 2 years.

The criminal investigation may be initiated *ex officio* by the authorities, or following the complaint of the owner of an SPC.

For the damages caused by the counterfeiting, the owner of the patent, or in this case of the SPC, is entitled to compensation, and may request to the competent court the seizure, and, as the case may be, the destruction of the counterfeited products, substances, and of the equipment which directly served for the production of the counterfeited products.

### *Legal action for damages*

The Patent Law provides that the infringer of patent rights is liable for damages to the patent owner. The value of the damages may be calculated depending on the basis of the market value of the infringing products, or of the products protected by the SPC.

The claim for compensation for damages filed in a criminal case is exempted from the payment of the stamp fee. In the case of filing a legal action in a civil court, the plaintiff must pay a stamp fee calculated on the basis of the value of the claim. The resolution of a criminal case usually takes more time than that of a civil case.

### *Filing of motions for obtaining injunction orders*

The owner of the SPC may apply for an injunction to stop the activities which are allegedly infringing on the rights conferred by the SPC. The issuance of an injunction can take from 1 - 2 weeks until 1 - 2 months from the date of filing the application. The injunction order may be subject to appeal.

## **Opposing the issuance of an SPC**

The opposition against an SPC application may challenge (i) the validity of the base patent, and/or of (ii) the Marketing Authorization of the product for which the SPC is requested.

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### Revocation

The procedure for opposing the granting of an SPC requires the filing of an application for the revocation of the SPC, according to the provisions of the Instruction 146. The application for revocation can be filed by any person during a 6-month term following the publication of the decision of granting the SPC.

Such application for the revocation of an SPC will be heard by the Appeals Commission of OSIM. The Appeals Commission will serve a copy of the application for the revocation of the SPC on the applicant, who can file a reply within 3 months as of the date of receipt.

The appeals pending before the Appeals Commission of OSIM are included in a list of pending cases, which is published periodically on the website of OSIM.

The decisions issued by the Appeals Commission of OSIM with regard to appeals and application for the revocation must be issued within 3 months from their respective date of filing with OSIM.

However, in practice, there may be several hearings before the said Appeals Commission, and it may take up to 6 months until the issuance of the decision of the Appeals Commission of OSIM. Thereafter, such decision must be drafted and notified to the parties within 15 days, but in practice, it may take longer, i.e. up to 1-2 months.

This means that the procedure regarding the examination of the application for the revocation of the SPC may take up to eight (8) months until the decision of the Appeals Commission is drafted and notified to the parties.

The decision of the Appeals Commission of OSIM may be further appealed with the competent court, i.e. with the Bucharest Tribunal, within 30 days from the date of notification to the parties.

The decision of the Bucharest Tribunal may be further appealed before the Bucharest Court of Appeals within 15 days as of the date when it was notified to the parties.

### Legal action for cancellation

According to the Patent Law, a legal action for cancellation of the SPC can be filed with the Bucharest Tribunal. There is no deadline for filing such legal action for cancellation of an SPC.

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