Romania
Takeover Guide

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INTRODUCTION

The purpose of this guide is to present an overview of the laws and regulations dealing with takeovers in Romania in respect of companies publicly traded on the local regulated market. Currently, there is one regulated market in Romania, namely the Bucharest Stock Exchange (BSE), and one multilateral trading facility (MTF) (ie, the AeRO market) operated by BSE.

This guide contains general information on takeover methods and restrictions, defences against takeovers, and certain practical tips for both bidders and targets.

In drafting this guide, we have taken into consideration the legal framework in force as at 7 March 2022.

This guide is meant as an overview of the Romanian legal framework in respect of takeovers, and in any case, may not be construed as professional advice to any concerned party.

REGULATION OF TAKEOVERS

The main local enactments that regulate the takeover of listed companies include the following:

- Law No 24/2017 on issuers of financial instruments and market operations (the 'Capital Market Law');
- Regulation of the National Securities Commission (NSC) No 5/2018 on issuers of financial instruments and market operations ('NSC Regulation 5/2018'); and
- Law No 31/1990 on companies (the 'Companies Law').

Additional rules become applicable where the local target company operates in specially regulated/supervised fields, such as banking/non-banking financial institutions, insurance and investment services/investment companies, where the acquisitions/divestments of at least qualified (+ten per cent) holdings would also require endorsement from the supervisory authorities in the respective fields (ie, National Bank of Romania and Financial Supervisory Authority (FSA)).

Romania is a member of the European Union, so EU enactments, guidelines and relevant case law have to be considered accordingly.

REGULATORY AUTHORITIES

The FSA

Since 30 April 2013, following a reorganisation of the local financial authorities in the capital markets, insurance and private pensions, the FSA has become the sole regulator in the respective areas, with overall competences in regulating and supervising capital market operations and players, and the implementation of secondary capital market enactments in the local market.

The main prerogatives of the FSA in connection with takeover operations are to approve preliminary offer announcements and, offer documents and advertising materials and

supervise the compliance of shareholders and investors using the takeover regulations. The FSA is also empowered to formally endorse certain types of operations that are restricted otherwise (eg, direct transfer of shares outside the on-market mechanisms), and may issue formal opinions on the interpretation and implementation of capital markets legislation.

In addition, given that Romania is a member of the EU, the FSA would liaise between similar authorities (national regulators and supervisors in the area of financial services) from other EU states in connection with takeover operations that involve participants from other EU states.

In the case of any infringement of the capital markets legal framework, the FSA is entitled to apply various sanctions (see Consequences of a Breach).

The regulated market

Subject to the observance of certain requirements, the Capital Market Law allows the creation of regulated markets and MTFs in line with the Markets in Financial Instruments Directive (MiFID).

The regulated markets and MTFs are entitled to issue, supplementary to general capital markets legislation, their own regulations on conditions for admission to trade and company delisting, trade of shares, public offers and so on. Also, they have certain supervising and sanctioning powers in connection with the operations performed through their systems. Currently, the BSE regulated market allows trading with securities (shares and bonds), units in undertakings for collective investments (UCIs), T-bills and derivatives.

THE REGULATORY MAZE: BROAD CONCEPTS

To whom do the takeover rules apply?

As a general rule, Romanian takeover enactments apply to Romanian target companies admitted to trade on local regulated markets. However, when the envisaged operation includes a local company that is also listed on a foreign regulated market or a foreign company that is also listed on the Romanian market, the Romanian Capital Market Law is relevant as follows:

- for targets admitted to trade on a Romanian regulated market and also in one of the other EU Member States, the foreign law applies to corporate matters (eg, the number of voting rights that triggers the obligations to conduct a mandatory takeover offer and limitations in a company's activity during a takeover), while the offer is subject to the laws of the EU Member State where the securities were first admitted to trade for the first time (eg, as to offer price, prospectus and disclosure requirements);

- in the case of target companies that were admitted to trade at the same time, both on a Romanian regulated market and on a regulated market of another EU Member State(s), the national law of the target company applies to the corporate obligations (as described above), while the offer is subject to the laws of the EU Member State chosen by the target company (either Romania or the other state(s)) by notifying the relevant authorities and regulated markets; and

- for Romanian target companies listed only on a foreign regulated market, the Romanian law shall apply in respect of corporate matters (as per above), while the foreign law applies to aspects regarding the offer (as per above).

Level of control that triggers the applicability of takeover rules

The holding threshold that triggers the application of the takeover regulations is 33 per cent of the voting rights in the target company (reached by way of direct and/or indirect participation, or together with persons acting in concert), namely:

- any offer by which the bidder wishes to acquire more than 33 per cent of the voting rights in the target company represents a voluntary takeover offer; and
- any person that exceeds 33 per cent of the voting rights in a company is compelled to conduct a mandatory takeover for all target's shares within two months; before that offer is made, no additional acquisitions can be made in the target and the voting rights exceeding the 33 per cent threshold are suspended.

There are gateways from the obligation to launch a mandatory takeover offering which relate mainly to acquisitions:

- within the privatisation process;
- from the Ministry of Public Finance or any other authorised entities within the foreclosure of budgetary receivables;
- between the parent company and any of its subsidiaries, or between the subsidiaries of the same parent company; and
- under a voluntary takeover offer addressed to all shareholders, for all their shareholdings.

Also, where the 33 per cent threshold was exceeded by 'unintentional operations' (ie, where shares are bought back followed by their cancellation by the company, by exercising a preferential right to subscribe for new shares as part of a share capital increase, or pursuant to merger/spin-off, inheritance), the shareholder may choose between conducting the mandatory takeover offer and selling the shares in excess of the 33 per cent threshold within three months.

However, after exceeding the 33 per cent threshold and conducting the mandatory takeover offer, there are no restrictions as to subsequent shares being acquired by the bidder in the target.

Some important percentage thresholds

- Five per cent, ten per cent, 20 per cent, 33 per cent, 50 per cent, 75 per cent or 90 per cent – exceeding or falling under such threshold triggers a reporting obligation on the shareholder;
- five per cent – holders may:
  - request special reports from the company's auditors;
  - directly bring an action against the directors/board members where their actions prejudiced the company;
  - request the convening of a shareholders' meeting; and
  - propose new items on the agenda of a general shareholders' meeting;

- ten per cent – a significant shareholder is entitled to:
  - request the application of the cumulative voting method for the election of the board of directors; and
  - in court, ask for a special review of the company's management;
- 33 per cent – triggers the applicability of mandatory takeover rules;
- 50 per cent + 1 – control of shareholder's decisions (if no higher threshold is provided in the company's charter); and
- over 95 per cent – allows the exercise of minority squeeze-out and sell-out rights.

Key concepts

In the field of takeovers, Romanian regulations use the following key concepts: 'voting rights', 'acquisition of shares' and 'persons acting in concert'.

Voting rights

Under the Capital Market Law, the number of voting rights held by a person in a listed company is the main benchmark for assessing the applicability of the mandatory takeover rules (ie, if the 33 per cent threshold is exceeded) to such a person, as well as the existence of certain special rights and/or obligations (see Some important percentage thresholds).

One main capital market rule is that the companies have to ensure equal treatment of holders of the same type/class of shares. Therefore, traded shares of the same class cannot have different voting powers.

Under the Company Law, there are two main types/classes of shares that may be issued:

- ordinary shares (one voting right is attached to one share – no different provision can be inserted in the articles of association as it would infringe the equality of treatment principle); and
- shares with no voting right that entitle the holder to a priority dividend, before any other distribution of the relevant profit.

However, under the capital markets regulations, the number of voting rights is computed not only by adding the number of shares held in the company by the respective shareholder but also by adding the voting rights held, inter alia, by entities/entities that act in concert with such a shareholder.

In the computation of voting rights held for assessing consequences under capital market regulations, suspended voting rights are also normally included (eg, voting rights in excess of the 33 per cent threshold prior to conducting the mandatory takeover offer and voting rights attached to shares held by the company).

Persons acting in concert

Capital market regulations, and, in particular, the takeover rules, have a broad scope in regards to the persons that have to comply with certain obligations by including not only the persons that directly hold certain voting rights/shareholdings in the company but also those that 'act in concert' with such persons.

The concept of persons 'acting in concert' refers to 'two or more persons bound by an express or tacit agreement to adopt a common policy in connection with an issuer'. The law

also enumerates certain cases where persons are legally presumed to act in concert (if no compelling evidence to the contrary is made), namely:

- persons controlled by the person/persons exercising control and persons controlled by each other;
- the parent company together with its subsidiaries and any of the subsidiaries of the same parent company, as well as a legal person together with a natural or other legal person that is in a relationship similar to that between a parent company and branch;
- a company with the members of its board of directors/supervisory board, with the persons who have management or control attributions within it and with the controlled persons, as well as these persons among themselves;
- collective investment undertakings with an investment management company and with the parent company of the investment management company, as well as collective investment undertakings managed by the same management company; and
- pension funds with the company that manages these funds and with the parent company of the company that manages these funds, as well as the entities between them.

In addition, the law also enumerates numerous additional presumptions of acting in concert based on certain links existing between the involved entities (in essence, such presumptions are based on various types of economic cooperation between the involved entities and an economic/financial link between such or similar conduct with regard to the relevant issuer); the spouse and relatives up to the second degree of persons subject to the presumption of acting in concert are also included in the scope of the concerted action presumption.

However, cooperation between shareholders on certain corporate matters included in a so-called *white list* does not qualify per se as acting in concert; by exception, the agreement to vote in the same way on the appointment of the board of directors/supervisory board shall be included in the acting in concert presumption.

Acquisition of shares

The concept of the acquisition of shares is rather broad and includes, inter alia, share acquisition under public offers (ie, takeover/purchase offers or a reply to sale offers), direct purchase operations conducted on the regulated market and subscription of shares under share capital increase operations. Therefore, normally, when assessing whether certain thresholds are met, the shares acquired under such operations are included.

Consequences of a breach

Depending on the actual breach of the takeover rules, various sanctions can be applied, namely:

- restraining the exercise of voting rights;
- restraining the acquisition of shares;
- invalidation of the agreement underlying the takeover action;
- invalidation of the offer;
- invalidation of share acquisitions; and
- warning or fines; notably, in the case of legal entities, the fine shall be established by reference to the yearly net turnover achieved in the year previous to sanctioning

(ie, fine between 0.1–10 per cent of the net yearly turnover, depending on the gravity of the misdemeanour and the actual circumstances).

Also, if purposely made, a breach of certain takeover rules could also result in a criminal offence sanctioned with fines or imprisonment.

ACTION BEFORE TAKEOVER, INSIDER TRADING AND MARKET MANIPULATION

Use of sensitive information

Regulation (EU) No 596/2014 on market abuse (‘MAR’) is directly applicable in Romania; also, local legislation comprises provisions on market abuse.

The use of price sensitive information (inside information) for the purchase/sale of shares, directly or through other persons, is strictly prohibited. Any such share sales/purchase would be invalid and the persons that performed the operation could be held criminally liable.

‘Inside information’ is information of a precise nature (ie, in regards to events or circumstances that had already occurred or are reasonably expected to occur), which has not been made public, referring either directly or indirectly to one or several companies or one or several shares and which, if publicly disclosed, might have a significant impact on the price of the shares.

As the market and the potential investor need to be informed at all times of the relevant matters regarding the company, all such inside information should be included in the current and periodical reports submitted by the company with the FSA/relevant market (BSE). However, where the immediate disclosure of information would harm the interests of the company, there are some circumstances when it may delay the disclosure, provided that it can ensure the confidentiality of the information.

Due diligence process

MAR comprises express legal provisions that regulate the selective disclosure of data (including inside data) regarding a listed company in the context of a market sounding, subject to strict observance of the market sounding legal framework.

Also, to the extent that:

- during such a market sounding process or otherwise, the potential investor aiming at a takeover learns about inside information regarding the target company; and
- the investor uses such information solely for proceeding with the takeover,

the transaction would not fall under the scope of insider trading prohibitions provided that, at the point of approval of acceptance of the offer by the shareholders of the company, any inside information has been made public or has otherwise ceased to constitute inside information.

Arrangements before the takeover

In some cases, takeovers may be preceded by the execution of an agreement between the controlling shareholder(s) and the bidder, whereby such shareholder(s) undertake to ensure the fulfilment of certain conditions precedent (that involve action to be taken within/in respect of the company) prior to the envisaged takeover. In such a case, if the company is compelled to meet certain conditions precedent, or the occurrence of such conditions is not

publicly disclosed, there is a risk that a takeover implemented based on such an agreement would qualify as insider trading. In order to prevent such a risk, it would be advisable to disclose to the FSA and the market at least the existence of such an agreement and the terms that could influence the company's activity.

However, given the vague standards and broad wording of insider trading provisions, and taking into account that local case law and legal doctrine on insider trading is rather scarce, there is no clear right/wrong line; as such, the risk assessment is to be made case by case.

Market manipulation

Market manipulation operations are prohibited. Market manipulation operations include, inter alia, transactions that would give false signals or would deceive as to the demand, offer or price of the shares; transactions aimed at keeping the price of the shares at an artificial/abnormal level; fictitious/deceitful transactions; and the spread of false information. Examples of market manipulation are:

- operations aimed at ensuring a dominant position on the demand of shares, having as an effect fixing, directly or indirectly, the sale/purchase price or creating other unfair trading conditions;
- sale or purchase of shares at the closing of the market in order to mislead investors that are acting on the basis of the closing prices; and
- benefiting from regular or occasional access to electronic or traditional media, by expressing an opinion in relation to the shares or to their issuer, if the shares were already held and benefits were derived from the impact of the opinions expressed in relation to that instrument, without making public at the same time the respective conflict of interests in a fair and efficient manner.

TAKEOVER METHODS

Available alternatives

First, it is important to highlight that, as per Romanian regulations, save for initial public sales made under a private placement regime (eg, the offering of shares under a share capital increase to less than 150 persons or only to qualified investors), all public sales (except of state-owned shares within the privatisation process) or public purchase offers regarding shares in listed companies must be made on the regulated market.

Also, generally, any share transfer needs to be performed on the market, through a financial intermediary, in compliance with the delivery versus payment mechanism. The exceptions from this requirement are few and include, inter alia, inheritance, separation of co-ownership, transfers to company's employees, share buy-backs as a result of shareholders exerting their withdrawal right, merger/dissolution/liquidation, privatisation and some categories of transfers expressly permitted by the FSA.

The main takeover alternatives to be considered (except for mergers) are the following.

On-market transactions:

- takeover/purchase offer;
- reply to a public sale offer initiated by company shareholder(s);
- direct share purchase on the regulated market by placing purchase orders;

- share capital increase operations in the target company – made by contribution *in cash*.

Off-market transactions:

- share capital increase operations in the target company – made by contribution *in kind or by converting the company's debt into shares;* and
- legally permitted over-the-counter (OTC) transactions.

PURCHASE/TAKEOVER OFFERS

Type of offers

- Mandatory takeover offer: has to be launched by a shareholder that has directly or indirectly (via change of control of the direct shareholder of the target) acquired more than 33 per cent of the voting rights; it is addressed to all shareholders for all their shareholdings and has to be initiated no later than two months from the moment the threshold was reached; until conducting the offer, the voting rights exceeding the 33 per cent threshold are suspended and no additional acquisitions of shares in the target can be made.

  As mentioned above (see the level of control that triggers the applicability of takeover rules), there are certain exceptions for conducting the mandatory takeover offer if the 33 per cent threshold is exceeded.

- Voluntary takeover offer: may be launched by a person aiming to acquire more than 33 per cent of the voting rights in the target company and is addressed to all the shareholders for all their shareholdings.

- Public purchase offer: may be launched by a person that aims to acquire shares in the target company (no minimum/maximum number of targeted shares being prescribed) provided that the offer could not qualify as a mandatory/voluntary takeover offer as per above (eg, under the purchase offer, the person holding more than 33 per cent of the voting rights aims at increasing its equity quota).

Key requirements

- Need to be performed on the regulated market, through a financial intermediary;

- need to be addressed to all shareholders of the target company by granting them equal treatment and opportunity to receive and assess the offer;

- the offer document needs to be endorsed in advance by the FSA (within ten business days) and made available to all shareholders for the duration of the offer;

- no advertising materials on the offer may be disseminated before the offer document is approved by the FSA; advertising materials need to comply with specific requirements;

- the application to the FSA for approving the offer shall, inter alia, include various documents attesting the identity of the bidder and of the persons it acts in concert with (eg, incorporation certificate and articles of association), and, if the bidder is a legal entity, the list of bidder's shareholders (up to one per cent holdings in the case of listed bidders); and the bidder's statement on the persons it acts in concert with in respect of the company; and

- strict compliance with the offer conditions endorsed by the FSA has to be observed under the sanction of the offer's invalidation.

Consideration

The price may be established in money, in securities or a combination of these two; however, shareholders should always be given the possibility to receive money. Where the price is established in securities/shares in other listed companies, detailed information on the issuer company has to be provided in the offer documents, similar to a sale offer prospectus.

The law provides for a minimum value of the offer price for each type of offer, as follows:

For mandatory takeover offers, the price has to be at least equal to the highest price paid by the bidder or by the persons the bidder acts in concert with during the past 12 months for shares in the target company.

However, special and distinct rules for establishing the offer's price will apply if the bidder (including the persons the bidder acts in concert with) has made no acquisitions within the above indicated timeframe or if, despite such acquisitions having been made, the FSA decides (based on grounded reasons) that such acquisitions were made in bad faith (ie, were targeted to influence/set the value of the offer's price). Moreover, the price establishment mechanisms will also depend on whether or not the bidder has complied with the relevant prescribed deadlines for the offer.

For voluntary takeover offers, the price has to be at least equal to the highest of:

- the highest price paid by the bidder or the persons the bidder acted in concert with during the past 12 months;
- the average weighted trading price for the past 12 months; and
- the price resulting from dividing the value of the company's net assets into the number of shares on issue, as per the latest financial statements of the company.

For purchase offers, the price shall be at least equal to the highest of:

- the highest price paid by the bidder or the persons the bidder acted in concert with, during the past 12 months;
- the weighted average trading price for the past 12 months; and
- in case none of the above is applicable, the price shall be the net assets per share, as per the last financial statements of the target company.

Duration of the offer

All purchase/takeover offers must last a minimum of ten business days and a maximum of 50 business days. The exact duration of the offer as chosen by the bidder is to be included in the offer announcement and document.

Variations to offer terms

The bidder may choose to amend the initial offer terms (price, closing date etc) provided that:

- the FSA approves such an amendment;

- the amendment would not entail less advantageous terms than the initial ones; and
- the amendment is publicly announced on the same conditions as the initial offer document.

Any amendment to the offer document needs to be submitted for FSA approval at least one business day prior to the offer's closing date. After the amendment's approval, the FSA may extend the duration of the offer for at least two business days as of the publishing of the amendment.

Competitive offers

Within ten business days of the announcement of the purchase/takeover offer, any person may launch a competitive offer targeting the same shares as the initial one, provided that such an offer's price is five per cent higher than the price of the initial offer.

The FSA shall set a common closing date for all offers, as well as a deadline for the submission of the price increase of the competitive offers. On such a latter date, the bidders shall meet the FSA auction commission and auction rounds shall take place, whereby the bidders may increase the price by up to five per cent per round. The auction is closed once one bidder does not offer a higher price.

Target's response

The target's response/position on the takeover is sought only in the case of voluntary takeover offers. In such a case, a preliminary announcement on the intention to make a takeover offer is to be submitted to the target's board of directors (after its approval by the FSA). The board has to promptly inform the employees about the matter (and may also consult with the shareholders) and has to provide its opinion to the FSA on the opportunity of the takeover and its forecast impact over the company (together with the grounds of such an opinion and the employees' position on the matter).

Target's standstill obligation

As of the initiation of a voluntary takeover offer, except for current management operations and the implementation of previous undertakings, the target company cannot take any measures/perform any operations that may alter its financial status or the takeover's objectives (eg, share capital increase, issuance of bonds, variation of corporate documents, entering into major business engagements etc).

Share purchases during the offer

After initiating the offer, the bidder/the persons it acts in concert with, may purchase target shares if:

- the purchase is made at a price higher than the offer price; and
- the purchase is made at least eight business days prior to the offer's closing date.

If the bidder/the persons it acts in concert with purchases target shares during the offer at a higher price than the offer price, the offer price must be increased to match the highest price paid for such purchases outside the offer.

Possibility to conduct subsequent offers

For one year as of the closing of a prior voluntary takeover offer, the bidder (and the persons acting in concert therewith) cannot initiate another takeover offer targeting the same company. No time limit is provided for regular purchase offers.

Reply to a public sale offer initiated by existing shareholder(s)

One alternative for acquiring control over a listed company may be by subscribing in a public sale offer(s) initiated by the company shareholder(s). A sale offer may last from five business days to one year, requires a prospectus approved by the FSA and has to be conducted through a financial intermediary. This last requirement is also applicable to acceptances/subscriptions to such sale offers.

The practical possibility to gain control in this way depends on the equity quota held by the interested investor, whether the seller launched a general offer (ie, addressed to the general public) or a targeted one (ie, addressed to qualified investors or a specific group of up to 150 persons) and whether the investor falls within the targeted category. In regard to the actual possibility to reach the targeted shareholding by accepting the offer, this depends on the share allocation method chosen by the seller in the prospectus (eg, first in, first out (FIFO) and pro rata).

Share a capital increase by a contribution in cash or by swapping into shares of the company's debts

Under share capital increases made by a contribution in cash, existing shareholders have, in principle, a preference right to subscribe pro rata for newly issued shares. In such a case, a shareholder/investor can increase its shareholding/acquire shares if:

- the other shareholders do not exercise (in full) their preference right; and/or
- the unsubscribed shares are subsequently publicly offered.

The granting of such a shareholders' preference right can only be made based on a prospectus, which needs to be approved by the FSA, and the subscriptions will be made via an intermediary.

Direct purchase from the regulated market

A straightforward option for gaining control over a listed company involves building up a share stake by placing purchase orders on the regulated market through financial intermediaries against the market price.

The purchase orders may be placed on the market to meet matching sale orders (which triggers the risk of competitive purchase orders having priority); they may also be directed to a chosen seller (based on prior arrangement) under a transaction conducted on the Deal market (hence avoiding the risk of competitive orders having priority).

Money laundering rules require the financial intermediaries to request the full disclosure of the identity of the purchaser.

OFF-MARKET TRANSACTIONS

Share capital increase by contribution in kind

Under such share capital increases, investors/existing shareholders can acquire shares/ increase their shareholding if the shareholders' extraordinary meeting approves with a qualified majority the share capital increase by contribution in kind with performant asset(s) owned by a shareholder/investor that is/are useful to the company.

OTC transactions

Conceptually, OTC transactions are transactions with listed shares conducted outside the trading platforms (regulated markets or MTFs). OTC transactions are currently allowed

mainly for the purpose of performing ‘turnaround transactions’ (so-called ‘OTC turnaround’).

Essentially, OTC turnaround entails a financial intermediary acquiring the intended stake via an on-market transaction (the so-called ‘correspondent transaction’) and, on the same day, that share stake (or a lower stake) is further transferred by the respective intermediary to the client (OTC transaction).

THE LIFECYCLE OF A TAKEOVER

The steps and documents for a voluntary takeover offer are as follows:

Deadline	Main actions
Pre-offer steps: preliminary announcement	T0: FSA approval on the preliminary takeover announcement
	T1= T0 + 5BD: preliminary announcement is sent to the target and relevant market (BSE)
	Preliminary announcement is published in central and local newspapers
	T2 = T1 + 5BD: the board of the target sends its position on the takeover opportunity to the FSA (it may also convene a shareholders’ meeting for such a purpose subject to 5CD prior notice)
Obtaining FSA approval for the takeover offer	T3 = T0 + 30CD: the bidder submits the takeover offer documents to the FSA for approval
	T4 = T3 + 10BD: approval by the FSA of the takeover offer documents
	Notification by the bidder to the market of the takeover approved offer document
Offer announcement and documents	T5 = T4/T4 + 10BD: publication of the offer announcement in two printed/online newspapers (one central and one local)
	Making available the offer documents on the bidder’s and intermediary’s websites/at their headquarters and/or in printed/online newspapers
Conducting the public takeover offer	T6 = T5 / T5 + 3BD: initiation of the takeover offer

	T7 = T6 + 10BD - 50BD: development of the takeover offer
Closing formalities	T8 = T7 + 5BD: notification by the bidder to the FSA and the market on the results of the offer
Share transfers and price payment	T9: offer's settlement performed by BSE
	T10 = T9 + 3BD: delivery versus payment and registration of the new shareholding structure

Minimum estimated duration: two and a half months.

Note

- BD = business days; CD = calendar days.
- The mandatory takeover offer follows the same schedule, subject to the obligation to initiate the offer within two months of exceeding the 33 per cent threshold and lack of involvement of the board of the target company. The regular purchase offer also mainly follows the same schedule, except for the involvement of the board of the target company.

DEFENDING THE TAKEOVER

Romanian law provides for limited defence alternatives. Also, the practice/doctrine on this matter is rather scarce.

However, from a practical perspective, many of the defensive takeover tactics applicable at international level are not legally prohibited and could be implemented in Romania. On the other hand, Romanian law prohibits the use of some internationally accepted takeover methods, as set out below.

Proactive defence tactics

These include action that could be taken before the takeover offer has been launched, aiming at making the takeover more difficult or the company less attractive from a takeover perspective, such as:

- amendment of the target's articles of association (eg, increasing the decision-making thresholds, establishing employee or management profit share schemes and granting option rights to current management/employees); and
- providing for 'golden parachutes' in the employment/management contracts of the target's management/board members.

Reactive defence tactics

These comprise action that could be taken after the takeover offer has been launched; including:

- seeking another investor to launch a competing offer for the same shares and with a price at least five per cent higher than that of the initial offer;
- launching a purchase offer for the shares of the bidder, if they are also publicly traded;
- a negative opinion from the target's board on the takeover (as per law, its opinion needs to be submitted to the FSA and the market) and from the target's employees/trade union (ie, creating an environment in the company that is hostile to the bidder); and
- based on the approval of the shareholders' extraordinary meeting, implementing amendments in relation to the company (eg, operational flows/lines and terms of key business contracts) that may deter the investor from taking over the company.

Constraints caused by the target's prescribed conduct

In regard to the initiation of voluntary takeover actions, except for current management and the implementation of previous undertakings, the target cannot take any measures/perform any operations that may alter its financial status or the takeover's objectives, unless they are approved prior by the shareholders' extraordinary meeting convened in relation to the voluntary takeover. Also the board has to constantly inform the FSA and the market (BSE) of all operations performed by the target's board/executive management in relation to the company's shares.

Hence, when choosing the defence alternative, it is necessary to consider that Romanian law provides certain restrictions in regard to the action that may be taken by the target after the initiation of the takeover, which would limit the applicability of methods such as the redeployment/transfer of key/valuable assets or restructuring the target company.

Although the board's opinion on the takeover is sought, it is compelled by the Company Law to act with loyalty towards the company and in its best interests; hence, the board's negative opinion on the takeover's opportunity must rest on sound ground.

SQUEEZE-OUT THE MINORITY AFTER THE TAKEOVER

On reaching 95 per cent of the shareholdings and voting rights in the target, the majority shareholder may exercise the right to squeeze-out the minority shareholders, and the minority shareholders may compel the majority shareholders to buy them out. The conditions, price and procedure for the exercise of these rights are strictly regulated.

The final result of the exercise of squeeze-out/sell-out procedures is the delisting of the company.

Squeeze-out procedure

The Capital Market Law provides for a special procedure whereby, after conducting a takeover/purchase offer addressed to all shareholders for all their holdings, the majority shareholder that:

- has exceeded 95 per cent of the share capital and voting rights in the target; or
- acquired more than 90 per cent of the targeted shares and voting rights through the takeover/purchase offer;

may compel the minority shareholders to sell their shares against a 'fair price'.

Such a ‘fair price’ shall be:

- in the case of a voluntary purchase/takeover offer, following which the majority shareholder has acquired more than 90 per cent of the target shares, the price within such a voluntary purchase/ takeover offer;

- in the case of a mandatory takeover offer, the price within such mandatory takeover offer; and

- in the case that none of the above applies, the price determined by an independent expert.

Sell-out procedure

If, after conducting a takeover/purchase offer addressed to all shareholders for all their holdings, the majority shareholder has exceeded 95 per cent of the share capital and voting rights in the target, the minority shareholders may compel the majority shareholder to purchase their shares against a ‘fair price’ (to be determined as in the squeeze-out case).

Conditional bids

Certain conditions, such as a maximum targeted shareholding, may be included in the offer terms of a regular purchase offer (ie, not of a takeover offer). However, any condition has to comply with the principle of granting equal treatment to all shareholders.