DISTRESSED M&A

Romania

LEXOLOGY
Getting The Deal Through

Consulting editor
Walder Wyss Ltd

Distressed M&A

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including market climate and legal framework; transaction structures and sale process; due diligence and mitigation of related risks; valuation and financing; documentation; regulatory and judicial approvals; dispute resolution; and recent trends.

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MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

Although the M&A market suffered in the first half of 2020, mainly due to the imposed covid-19 lockdown and the uncertainty that followed such an unprecedented situation, the Romanian M&A market quickly picked up in the second half of the year and continued to focus on deals for businesses that had and have an exceptional track record.

Continuing the trend, in 2021, we have witnessed fairly dynamic M&A activity in Romania, which included some sizeable deals for our jurisdiction. Despite covid-19, distressed M&A transactions in Romania still seem sporadic, with only a handful of active buyers, typically opportunistic or coming from the non-performing loans sector.

Law stated - 01 November 2021

Legal framework

What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

There is no specific regulatory regime applicable for distressed M&A transactions, except in the case where the target is subject to insolvency proceedings, as regulated under Law No. 85/2014 regulating insolvency prevention and insolvency proceedings (the Insolvency Law).

The administration of insolvency proceedings is done by insolvency practitioners under the control of a syndic judge.

Law stated - 01 November 2021

Main risk in distressed M&A transactions

Summarise the main risks to all parties involved.

We recognise in Romania the typical risks encountered in any distressed M&A transaction. While working under a severely truncated timetable and having limited due diligence information owing to an often underprepared and resource constrained target, the parties face an acute lack of certainty, respectively, for the seller in closing the transaction and, for the buyer, in having full understanding of the risks entailed by the deal and obtaining adequate title protection. Even when information is available, the business is often sold on an ‘as is’ basis, with limited, if any, warranties and indemnities provided by the seller.

Moreover, besides the regulatory, antitrust and change of control consents that would be applicable under normal M&A, in distressed M&A most often the deal will depend on the approval of creditors, either given the encumbrances established over the assets or as part of the insolvency proceedings. In the case of insolvency, a judicial administrator or liquidator will conduct the sale, but only after the proper steps with the creditors’ meeting and the syndic judge have been fulfilled.

Law stated - 01 November 2021

Director and officer liability and duties

What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

If the target is in a financially deteriorating condition, any M&A deal entailing a sale of assets must be implemented with caution, as any asset transfer performed generally within two years preceding the opening of the insolvency proceedings may be scrutinised once the insolvency proceeding has been opened. Such a transfer may be invalidated if it is determined that it was performed with the intention to conceal or delay the state of insolvency or defrauding a creditor.

Directors will be held liable if it is established that the transfers have been concluded with the intention of defrauding the creditors. Importantly, transactions concluded by the debtor in its normal course of business cannot be set aside.

Members of the debtor's management, supervisory board or any other persons that caused the insolvency of the debtor are jointly and severally liable if the insolvency situation arose before or during the period of their mandate. Such persons may avoid liability if they objected to the acts or transaction that caused the insolvency situation to arise or were absent when the respective decisions were taken or approved. Although the threat of such liability may, in theory, discourage potential managers from accepting positions within financially distressed companies, in practice this does not appear to be the case. Any such claims are subject to a three-year statute of limitation from the date when the person responsible knew or should have known, but no later than two years from the date of the decision of the court to commence insolvency proceedings against the debtor.

Once the insolvency proceeding has been opened, the management right of the directors may be removed, and the business of the company will be managed by a special administrator under the supervision of the judicial administrator or, respectively, the judicial liquidator.

Law stated - 01 November 2021

Differences from non-distressed M&A

In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

A distressed environment will impact the manner in which the deal is conducted.

- Negotiation position: time is of the essence in a distress scenario and makes the difference between saving a business or letting it plunge into insolvency. Therefore, the seller is less likely to be able to achieve a deal on its own terms or to be in a position to walk away from the negotiation table.
- Material adverse change (MAC) clauses: under non-distressed M&A, MAC clauses are less common than in the United States, but more frequent than in the rest of Europe. However, in a distressed M&A transaction, the seller will need certainty that the deal will be closed, while the buyer will seek assurances that it may walk away if certain events occur. Therefore, the MAC clause will play a vital role for both parties.
- Representations, warranties and indemnities (W&I): sellers in distressed M&A transactions are less willing to provide representations and warranties or undertake indemnities. This may in any case prove ineffective, especially if the future status of the seller is uncertain. Synthetic W&I insurance policies may be a problem-solver. Distressed M&A transactions will typically be conducted under an 'as is' principle, especially if falling under the insolvency umbrella, when the judicial administrators or (as the case may be) liquidators do not generally provide representations and warranties. However, the title obtained over assets sold in an enforcement or insolvency proceeding is typically seen as very secure and may prove difficult to invalidate.

- Price expectations: buyers may expect a bargain while sellers may still look forward to receiving the same price they would have received under normal circumstances. Also, significantly fewer or no warranties at all will tip the scale in an unfavourable balance to the seller.

Law stated - 01 November 2021

Timing of transactions

What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

In any distressed transaction, the clock is ticking from both the perspective of closing certainty as well as the actual implementation. If the target is in urgent need of financial support, buyers should establish if regulatory clearances are required as early as possible, obtain derogations or access expedited clearance processes if possible.

The decisional flow once the target has entered insolvency is highly regulated under Romanian law and leaves little space for the seller and the buyer to establish a desirable time frame. Therefore, an M&A transaction should be ideally signed and closed before the opening of any insolvency proceedings. However, there are also some benefits to structuring deals after the initiation of insolvency proceedings: even though more burdensome, an asset deal carried out during the insolvency proceedings allows for the buyer to acquire assets free and clear of all encumbrances and with good title.

Law stated - 01 November 2021

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

For distressed targets that have not yet entered insolvency proceedings, the same deal structure principles will apply as for financially healthy companies. This will usually be established based on the interest of the buyer (ie, the company as a whole or cherry-picking assets and leaving certain liabilities behind), as well as on the indebtedness of the target and the necessary cash injections to get the company afloat.

Therefore, while the typical deal structure preferred in Romanian M&A transactions is a share sale, which bears a few advantages (such fewer less formalities and low costs), this will also involve, in a distressed scenario, taking over indebtedness and assuming an injection of capital.

On the other hand, an asset sale will involve fewer or no liabilities being taken over by the buyer and will also allow the buyer to cherry pick the assets rather than acquiring everything. In an asset sale structure, however, the costs may be slightly higher (if immovable assets and material notary costs may be applicable) and may also entail a Transfer of Undertakings employee transfer.

Mergers are not commonly used in Romania due to higher costs, as well as higher implementation time requirements (it may take as long as one year to implement).

Once the insolvency proceeding has been initiated, asset sales are the common deal structures. Loan-to-own may also be a structure of interest; however, securing a main creditor position may be difficult, given the ranking rules under the Insolvency Law. Moreover, prior to proceeding with the sale of assets, certain formalities and approvals involving the creditors' meeting and syndic judge will be necessary.

Law stated - 01 November 2021

Packaging and transferring assets

How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

If a company is in deteriorating financial health, any transfer of assets must be structured with caution, since there is generally a two-year period preceding the opening of the insolvency proceeding which will be scrutinised once the procedure is opened. Therefore, any carve-outs and hive-downs will have to be performed bearing this in mind.

Pre-pack administrations are not regulated under Romanian law.

The sale of assets in distressed M&A transactions is more strict once the target has entered insolvency. Insolvency proceedings are highly regulated under Romanian law, and involve various approvals and confirmations that must be obtained from the creditors' assembly and the court of law prior to implementing it:

- In case of judicial reorganisation, the asset sale must be encapsulated under the reorganisation plan approved by the creditors' committee and confirmed by the court of law. For any amendment to the plan, the approval of the creditors' committee and the confirmation of the syndic judge must be obtained; and
- in case of bankruptcy, the assets will be evaluated by an authorised valuator and the creditors committee must approve the valuation reports as well as the type of sale (direct negotiation, auction or a combination of the two) and the sale regulation.

Law stated - 01 November 2021

Transfer of liabilities

What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

In distressed M&A deals and especially under an insolvency scenario, buyers are typically more attracted to asset deals (irrespective if structured as a transfer of a going concern or an individual asset sale), mainly due to their interest to leave liabilities behind. Distressed M&A transactions often involve limited information in scope and quality as opposed to a proper due diligence under normal circumstances; hence, cherry-picking assets without assuming any known or unknown liabilities is more appealing to investors. Under Romanian law, with a few exceptions, the successor liability theory is not applicable, in the sense that in the case of an asset deal, the parties may agree contractually which assets (and liabilities) are transferred to the buyer.

Law stated - 01 November 2021

Consent and involvement of third parties

What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

In the case of companies subject to insolvency proceedings, any sale of assets must be included in a reorganisation or liquidation plan approved by the creditors' assembly and the court of law.

The required consent obtained from and the involvement of third parties in sales of distressed targets or assets that

are not subject to insolvency proceedings are fairly similar to non-distressed M&A sales.

- Shareholders: in the case of Romanian limited liability companies, the transfer of shares to a third party must be approved by the company's shareholders representing at least 75 per cent of the share capital only in case the articles of association of the company do not provide otherwise. In matters concerning asset deals, if the value of the transferred assets exceeds half of the accounting value of the company's assets, a shareholder's approval will be necessary.
- Contractual partners: prior consent of contractual partners is necessary only if the respective contracts contain a change of control clause (in the case of a share deal scenario) or if they fail to provide a free transfer clause (if the contract is transferred as part of a business transfer).
- Lenders: typically, in Romania, credit facility agreements contain change of control clauses that require either the approval or the consent of the lender prior to the completion of the share deal. Furthermore, if the target's shares or, as the case may be, the assets are mortgaged, the consent of the mortgagor must be also obtained prior to the completion of the transaction.
- Romanian Competition Council (RCC): deals involving companies with turnovers exceeding certain thresholds are subject to clearance by the RCC.
- Supreme Council of State Defence (SCSD): if the transaction involves concentrations or changes of control over targets or assets placed in certain strategic sectors, the consent of the SCSD must be obtained.
- Regulatory consents and approvals: depending on the type of industries in which the target is active, there may be certain regulators and specific legal frameworks (eg, prior notifications, obtaining consents) to be considered. For example, the National Bank of Romania for transactions involving banks and financial institutions, the National Audio-visual Council of Romania for transactions involving radios and televisions and the Financial Supervisory Authority for transactions involving listed companies and entities operating in the insurance and private pensions sector.

Failure to observe the mandatory requirements under Romanian law (including obtaining the necessary consents) renders it impossible to validly implement the transaction. In cases where the consent is contractually agreed, the lack of consent may trigger termination of the commercial relationship and damages for not observing the contractual provisions.

Law stated - 01 November 2021

Time frame

How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

Time is of the essence when acquiring distressed targets or assets due to the urgent liquidity needs on the part of the sellers or targets, especially in circumstances where the value of the targets' business and assets is rapidly diminishing. Transaction documents are sometimes negotiated overnight, and due diligence is limited to weeks or even days instead of what otherwise would have been months. However, following the initiation of formal insolvency proceedings, specific time frames set by the insolvency administrator and the insolvency court, in particular with respect to the submission of offers, must be considered.

In a distressed scenario, an asset deal is typically the preferred option (although at times this may entail significant costs), given that in most cases a prudent buyer identifies in advance the assets that it wants to acquire, and it may leave behind all or certain liabilities.

A share deal generally implies a more thorough due diligence process, similar to that of a non-distressed M&A

transaction, albeit within a compressed timeline. However, a share deal allows the sellers to preserve value (eg, by avoiding the need to move key contracts and assets). Since buyers need to act quickly, their prior knowledge of the targets or of the sector are also important, to take a risk-weighted approach to key issues and expedite the acquisition process.

Law stated - 01 November 2021

Tax treatment

What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

There are no particularities in the Romanian fiscal legislation regarding the sale of distressed businesses. Such transactions are subject to the same general taxation rules as for the sale of a company functioning in its normal course of business. Depending on the transaction's structure, the following tax aspects should be briefly considered:

- sale of business: it is out of VAT scope (certain conditions apply) and it is taxable from a corporate tax perspective (the profit from the sale of the business, if any, is added to the tax result incurred by the seller from its current activities and the result, if profit, is taxed at 16 per cent); and
- sale of shares: capital gains derived by targets' shareholders from selling shares in Romanian companies are generally subject to 16 per cent corporate tax in Romania. Under certain conditions, an exemption may apply (eg, minimum 10 per cent shareholding, minimum one-year holding period, seller is a tax resident in a state with which Romania has concluded a double tax treaty). Capital gains obtained by individuals, who are shareholders in Romanian companies, are subject to 10 per cent income tax, but treaty relief may be applicable if the individual is a resident in a state with which Romania has concluded a double tax treaty.

Law stated - 01 November 2021

Auction versus single-buyer sale process

What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

Most of the acquisitions, irrespective of a distressed or non-distressed nature, are carried out through sale and purchase agreements negotiated in bilateral processes. The latter provide more flexibility to negotiate the terms and conditions, especially in a covid-19 context.

Auction processes are substantially less frequent in Romania, except when it comes to companies undergoing insolvency proceedings, where the maximisation of the price prevails and hence auctions represent the rule. A buyer acquiring assets from a company undergoing insolvency proceedings through a public auction can enjoy the benefits of being engaged in a court-supervised process that in principle moves on a timeline provided by law. Nevertheless, public auctions may be less appealing for certain investors given that no exclusivity is granted, and overbidding may also occur.

For competitive processes organised before commencement of any insolvency proceedings, sellers are free to determine the specific rules and procedures of the auctions depending on the circumstances of the transaction, such as the transaction size, the number of bidders and the size of the stake in the target offered for sale.

Law stated - 01 November 2021

DUE DILIGENCE

Key areas

What are the most critical areas of due diligence in a distressed M&A transaction?

The focus of the due diligence in a distressed M&A transaction, as well as in any other M&A transaction, depends on the structure of the transaction and the industry.

In a share sale of a distressed target, the legal due diligence will typically investigate the title to shares, but also the liability of the target deriving from:

- related parties' agreements;
- financial arrangements;
- employment matters;
- material contracts;
- litigation; and
- compliance and data protection issues.

For asset deals, the legal due diligence will concern the confirmation of the property title to the assets subject to transfer, as well as the liabilities related to the assets such as:

- Transfer of Undertakings risks;
- material contracts pertaining to the asset;
- litigation;
- financing related to the asset; and
- compliance.

Moreover, depending on the industry, due diligence exercises will also analyse specific regulatory issues, such as necessary authorisations and permits, as well as approvals, consents and notifications to be made prior to the transaction.

Law stated - 01 November 2021

Searches

What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

In Romania, there are five publicly available information sources, as follows:

- Trade Registry: this is a critical source of information on almost all matters involving the corporate status and history of a company. Furthermore, specific searches can be made in connection with a specific person for determining the companies in which he or she is registered as shareholder, legal representative or beneficial owner;
- Ministry of Public Finances: the most significant elements of the financial statements submitted by Romanian companies are publicly available on the website of the Ministry of Public Finances, such as the turnover, the registered profit or loss, the average number of employees, and the value of assets or debts;

- Electronic Archive of Security Interests in Movable Property: searches made with the Electronic Archive will provide a preliminary understanding on the encumbrances given by a Romanian company to its lenders, including identifying any share pledges that may have been established over the shares of a company;
- Land Book Registry: searches made with the land book registry are an essential tool for any potential buyer. In Romania, typically ownership rights and other real rights over immovable assets (including mortgages) are registered with the land book registry and any third party may obtain information regarding current and previous ownership, property location, etc. However, given that the Land Book Registry is not fully operational, such registrations do not currently have any constitutive effects on rights and are made only for third-party opposition purposes; and
- Courts of Law websites: all Romanian courts of law publish information regarding court cases on a website that may be freely accessed.

Except for the Land Book Registry and certain matters from the Trade Registry, all other sources can be researched online.

Law stated - 01 November 2021

Contractual protections and risk mitigation

What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

Although not used as often as in the United States, a material adverse clause (MAC) can be a mitigating factor for due diligence gaps and offer a certain degree of comfort to the buyer that the triggering of certain events will provide the possibility to terminate the agreement between signing and closing.

Given the unprecedented pandemic situation and considering that a MAC typically excludes events affecting the market in general (eg, pandemics or diseases), hardship may be another mechanism that the buyer may resort to. Under Romanian law, this is possible as long as the parties have not specifically excluded its application under the contract.

Considering that, in distressed M&A transactions, sellers may be less willing or unable to provide warranty and indemnity protection (and even if given, due to the nature of the transaction, it will be questionable whether the sellers can stand behind it), buyers may consider 'synthetic' W&I insurance policies.

Depending on where the value breaks, lenders are also sometimes asked to roll over some of their value into a new structure (anticipating a better rate of recovery than would be the case in an upfront cash deal).

Law stated - 01 November 2021

VALUATION AND FINANCING

Pricing mechanisms and adjustments

What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

In general, the Romanian M&A market seems to favour completion accounts. The landscape differs, however, when it comes to distressed transactions, where the locked-box mechanism represents the norm. This mechanism is mostly

used by sellers with negotiation power, but also for declining businesses.

In addition, we have started to identify an increased interest for earn-outs, rollovers or deferred consideration as a result of uncertainty caused by the covid-19 crisis and its lasting impact on the M&A market.

Law stated - 01 November 2021

Fraudulent conveyance

What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

As a general rule, fraudulent transactions entered into within the last two years prior to the opening of the insolvency proceedings may be challenged if they were detrimental to the creditors. For fraud to exist, it must be proven that the company acted in bad faith, with the purpose to prejudice its creditors and to obtain for itself or for another person an undue advantage. It is sufficient that the fraudulent intent existed in respect to the company and that the action was detrimental to the creditors, irrespective of the other party's knowledge.

For example, the following transactions may be set aside:

- gratuitous transfers if they occurred within the last two years prior to the commencement of the insolvency proceedings;
- if the consideration of, or the performance rendered by, the company manifestly exceeds the performance of, or goods received by, the counterparty, if such occurred within the last six months prior to the commencement of the insolvency proceedings;
- deeds concluded within the last two years prior to the commencement of the insolvency proceedings with the clear intent of putting assets beyond the reach of creditors, harming the creditors in any other way; or
- using ruinous means to procure funds for the debtor for the purpose of delaying the cessation of payments (case law examples of 'ruinous means' include the conclusion of loan contracts with a higher-than-market interest rate or the sale of assets at a price significantly below market value).

Clawback implies actions to recover those transferred assets, or if not possible, their monetary value as of the date when the challenged transfer occurred. The judicial administrator or liquidator may bring an action seeking to annul certain transactions within one year of the judicial administrator's or liquidator's report detailing the reasons for insolvency. However, any such action must be brought within the absolute time limit of 16 months from the commencement of the proceedings.

Law stated - 01 November 2021

Financing

What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

Securing financing for a distressed business is a critical part of a successful restructuring. Without such financing, the business may be unable to meet liquidity constraints, or to implement its restructuring plans.

In a distressed M&A transaction, local banks are typically reluctant to provide financing without considerable financial support from the shareholders or the buyer's support. In general, the buyer must finance a significant portion of the required financing itself, while the banks will only cover a reduced part of the amount necessary to fully reorganise the

business of the distressed entity. In addition to standard securities over the company assets or shares, such as a first rank mortgage, banks also request additional reassurance from the purchaser by securing assets or shares within the purchaser's group.

Commonly, bridge financing is used in distressed M&A transactions. Since distressed M&A deals are subject to timing constraints, buyers may resort to short-term loans or use fund-level debt financing. Covid-19 has had an effect on pricing and the leverage offered by debt providers, but the leveraged finance market still looks open for the right type of deals.

Law stated - 01 November 2021

Pre-closing funding

What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

Purchasers are not typically willing to provide any funding unless they have reached closing. Debt term sheets or equity commitment letters are negotiated for closing or post-closing funding. We have, however, seen cases where pre-closing funding was also provided to ensure operational costs until closing.

Law stated - 01 November 2021

DOCUMENTATION

Closing conditions

What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

Acquisition agreements in distressed M&A deals are usually subject to very limited, if any, closing conditions, with the most common being:

- mandatory and suspensive regulatory conditions such as merger control clearance;
- financing (eg, bank consents);
- no material adverse change (which is not as common as in the United States, but more frequent than in the rest of Europe); and
- corporate approvals and any other necessary third-party consents.

Law stated - 01 November 2021

Representations, warranties and indemnities

What representations, warranties and indemnities are commonly given in distressed M&A transactions?

In distressed M&A transactions, warranties are often limited to fundamental warranties and even these are fairly limited most of the time. The minimum set of given warranties typically cover standard fundamental warranties such as the seller's authority, capacity and title (but other warranties that the buyer is particularly concerned about such as environmental or IP can be included). If the target is undergoing insolvency proceedings, the judicial administrator or liquidator may not be willing to give any warranties at all.

Law stated - 01 November 2021

Remedies for breach

What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

Usually, sellers are entitled to remedy a warranty breach within a certain time frame. If the seller fails, or is not able to remedy the breach, the buyer is entitled to monetary damages, which in distressed M&A transactions are limited to the extent legally possible.

Sellers are less willing to provide warranty and indemnity protection and, moreover, they may be less able to stand behind such warranties and indemnities, if given. As a result, the buyer may negotiate a different purchase price mechanism whereby part of such purchase price is used to secure specific risks for a given period of time.

Law stated - 01 November 2021

Insurance

Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

Romania has piqued the interest of W&I insurers in the past few years, W&I insurance policies becoming a key part of transactions. W&I policies are certainly less common in distressed M&A. It is expected that insurers will also provide synthetic W&I policies on the Romanian market, but it remains to be seen under which conditions this will be offered.

Law stated - 01 November 2021

REGULATORY AND JUDICIAL APPROVALS

Merger control

What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the ‘failing firm’ defence recognised in your jurisdiction?

From a merger control perspective, the acquisition of distressed businesses and assets falls under the standard legal framework applicable to economic concentrations.

If the thresholds are met (ie, the involved undertakings generated in the previous financial year a combined worldwide turnover exceeding €10 million and at least two of the undertakings concerned achieved a turnover exceeding €4 million in Romania), notification is mandatory and the implementation of the transaction is subject to a standstill obligation pending clearance of the transaction by the Romanian Competition Council (RCC). A derogation from the standstill obligation could be granted, particularly if urgency is justified based on the need to preserve the distressed assets’ market value or operations.

In practice, the RCC applies the principles underlying the ‘failing firm’ defence based on EC case law and EC Guidelines on the assessment of horizontal mergers.

Law stated - 01 November 2021

Foreign investment review

Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

As a general rule, foreign investments are subject to the same regulations as domestic investments, whereas the competent authorities are entitled to analyse and object to foreign investments in strategic sectors, irrespective of the nationality of the investor, of the value of the transaction or the object or scope of the transaction. The general rules do not differentiate in relation to the object of the transaction; thus, it is irrelevant whether it qualifies as a distressed M&A.

In the case of economic concentrations that may also raise national security risks, irrespective of whether such are notifiable to the RCC, the Supreme Council of State Defence (SCSD) has the right to conduct its own assessment if a potential national security risk may arise in certain national security domains such as financial, fiscal, banking and insurance safety, agriculture and environmental protection, energy safety and industrial safety.

From a procedural perspective, economic concentrations are notified to the SCSD in all situations via the RCC. The SCSD will inform the RCC as soon as possible regarding the approval or prohibition of the transaction. In the event of a prohibition, the Romanian government will issue a decision prohibiting the transaction that is further communicated to the RCC and to the involved parties.

To our knowledge, no transactions have been rejected by the SCSD.

The current foreign direct investment (FDI) regime is, however, expected to be amended in the near future, as Romania is currently in the process of implementing into the national legislation Regulation No. 2019/452 establishing a framework for the screening of foreign direct investments into the EU.

The new proposed regime imposes stricter scrutiny on direct or indirect non-EU investors for those investments made into sensitive or critical sectors in Romania, while the list of sensitive sectors remains extremely broad under the new FDI screening regime, potentially catching transactions in all business areas.

Furthermore, the new regime shall cover any type of investment conferring a control right over the management of a Romanian company or assets that is above €2 million in value. Notably, as per the draft law, any other FDIs (that are below the €2 million threshold or in non-strategic sectors) could be subject to ex officio screening on grounds of public security, whereas portfolio investments are exempted.

Law stated - 01 November 2021

Bankruptcy court

What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

Insolvency proceedings are quite complex and restrictive, with limited room for flexibility. Any substantial sale in an insolvency proceeding requires the approval of the creditors' assembly and of the syndic judge. The applicable sale procedure (eg, direct sale or public auction) is generally chosen (voted upon) by the creditors. In our practice, reaching a common position at the creditors' level becomes even more important when the value of the divesture increases (such as in the case of the entire business or a relevant part thereof: for example, a line of business being sold as a going concern).

Although the sale of a going concern typically commands a higher price and is – at least in the short run – more beneficial for the economy at large, the law does not stipulate a preference. Under insolvency proceedings, assets tend to be sold individually or unbundled and not as an M&A deal (share deal or business deal).

Law stated - 01 November 2021

DISPUTE RESOLUTION

Common disputes and settlement

What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

The most common type of dispute in the case of distressed M&A transactions as part of insolvency proceedings is between the creditors or respectively between the creditors and the syndic judge regarding the confirmation of the transaction.

In a bankruptcy context, for settling a dispute out of court, the approval of the creditors' meeting and a syndic judge may be necessary.

Outside insolvency proceedings, disputes pertain to disagreements between sellers or shareholders, or between seller and buyer, regarding various contractual clauses or securities given, such as granting of representations and warranties or indemnities and the extent thereof.

Law stated - 01 November 2021

Litigation and alternative dispute resolution

What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

The litigation forum in the context of insolvency proceedings is the syndic judge (ie, the bankruptcy court), such as in the case of disputes regarding the approval of the transaction, sale price, etc. Recourse to ADR is virtually non-existent in the insolvency or bankruptcy context.

Ordinary courts are, in principle, competent for issues arising out of the contract, such as representations and warranties, indemnities or execution of the contract in distressed M&A transactions done prior to insolvency proceedings. In such situations, ADR may be used; however, courts seem to remain the preferred recourse in most domestic contracts that we see.

Law stated - 01 November 2021

UPDATE AND TRENDS

Recent developments and outlook

What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

The past three years have set positive records for regular M&A deals in Romania. Distressed M&A has not, however, been a primary focus of investors, except maybe in some opportunistic situations or as regards certain non-performing loans portfolios. Notably, there was a failed acquisition of City Insurance SA, one of the biggest insurance companies in Romania, having assets worth €700 million and written gross premiums of €500 million and boasting a portfolio of four

million clients, representing half of Romania's mandatory car insurance policies, as reported. In the City Insurance case, although a transaction was signed with a prospective buyer the Romanian insurance regulator placed the company in special supervision, replaced the management with the Insurers Guarantee Fund and ultimately withdrew the licence of the insurance company and opened the bankruptcy proceedings.

Considering that the pandemic has threatened and is still considerably threatening the good standing of some Romanian companies, the general expectation, although not desirable, is for the M&A market to slowly shift to distressed companies. We note that such a trend has not been visible until now, presumably given that distressed businesses were rather sold as individual assets and not via M&A deals.

Law stated - 01 November 2021

Jurisdictions

Austria	Wolf Theiss
Brazil	Machado Meyer Advogados
Bulgaria	Wolf Theiss
Canada	Cassels Brock & Blackwell LLP
France	JEANTET
Greece	VAP Law Offices
Hungary	Wolf Theiss
Netherlands	Van Doorne
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