

ROMANIA

# Investment rules of the world



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## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# Romania

*Last modified 20 October 2017*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

There are restrictions on offering and selling debt securities under both Romanian and EU law.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities to the public in Romania or to request that they are admitted to trading on a regulated market operating in Romania unless a prospectus approved by the Financial Supervisory Authority has been made available to the public.

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#### *What are common issuing methods and types of debt securities?*

The most common types of debt securities issued in Romania are bonds or notes issued on a stand-alone basis or under a program.

Common forms of debt securities offered in Romania include:

- government bonds and treasury certificates;
- municipal bonds;
- corporate bonds;
- exchangeable bonds (debt securities convertible into the equity of a third party); and
- warrants (securities giving the holders the option to purchase the equity of the issuer or a related company).

In addition, following the enactment of Law No 304/2015 which entered into force on March 2016, a new legislative framework was established in order to facilitate the issuance of mortgage covered bonds by credit institutions.

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#### *What are the differences between offering debt securities to institutional / professional or other investors?*

The preparation and publishing of a prospectus are not mandatory for an offer of securities addressed solely to professional investors.

Professional investors are defined as clients who have the experience, knowledge and ability required to take investment decisions and assess the risks involved, and include, *inter alios*, the following:

- credit institutions;
- investment firms;
- other financial institutions authorized or regulated;
- insurance companies;
- Undertakings for Collective Investments In Transferable Securities (UCITS) and their management firms;
- pension funds and their management firms;
- traders; and
- firms which meet two of the following requirements:
  - aggregate balance sheet – €20 million;
  - net turnover – €40 million; and
  - equity – €2 million.

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### *When is it necessary to prepare a prospectus?*

Under Romanian law, unless an exemption applies, it is necessary to publish a prospectus approved by the Financial Supervisory Authority where there is an offer of securities to the public.

Certain exemptions where the preparation and publishing of a prospectus are not mandatory apply, such as, inter alios, the following:

- an offer of securities addressed solely to qualified investors;
- an offer of securities addressed to less than 150 investors, natural or legal persons, other than qualified investors, per member state of the EU;
- an offer of securities addressed to investors who each acquire securities of at least the equivalent in RON of €100,000 for each separate offer;
- an offer of securities whose nominal value per unit amounts to at least the RON equivalent of €100,000; and
- an offer of securities whose total value in the EU is less than the equivalent in RON of €100,000, calculated over a period of 12 months.

Even if the offer is exempted from the prospectus requirement, as a general rule a prospectus is still required if an application is made for the securities to be admitted to trading on a regulated market.

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### *What are the main exchanges available?*

#### **The Bucharest Stock Exchange**

The Bucharest Stock Exchange is authorized by the Financial Supervisory Authority (FSA) as a market operator and, as such, it manages a spot regulated market.

The Bucharest Stock Exchange is also authorized by the FSA as a system operator. In this capacity, it operates an Alternative Trading System (Multilateral Trading Facility).

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### *Is there a private placement market?*

Romania has a low-volume private placement market.

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## ***Are there any other notable risks or issues around issuing or investing in debt securities?***

### **Issuing debt securities**

Making a public offer without the Financial Supervisory Authority's approval of the prospectus, when no exemption applies, constitutes an administrative offense.

Issuers are required to take responsibility for prospectuses for debt securities.

Misleading statements in, or omissions from, any applicable offering document may give rise to civil and, under certain circumstances and mainly in case of willful misconduct, criminal liability.

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## **Establishing and investing in debt / hedge funds**

### ***Are there any restrictions on establishing a fund?***

In order to comply with the Romanian legislation, investment vehicles must be established in accordance with the following conditions.

### **Undertakings for Collective Investments In Transferable Securities (UCITS)**

UCITS for which Romania is home member state, may only operate based on the authorization issued by the Financial Supervisory Authority (FSA).

The FSA authorization shall not be issued in case:

- the persons who effectively manage the fund do not have the reputation or necessary experience to perform activities which are specific to a certain type of UCITS; or
- the UCITS is restricted by law (including by inserting a provision in the rules of the fund or in the articles of association of the company) to distribute all the participation titles on the territory of Romania.

### **Open-ended investment funds**

The initiative for setting up an open-ended investment fund belongs exclusively to the investment management company, in accordance with the decision of the board.

Open-ended investment funds are managed by an investment management company. Therefore, a prerequisite for obtaining a license from the FSA is to have a license for the investment management company or the consent of the FSA with regards to an investment management company's request from a member state to manage the respective investment fund.

### **Open-ended investment companies**

Open-ended investment companies must be licensed by the FSA (the licensing requirements for open-ended investment funds are also applicable to open-ended investment companies). Such companies may be managed either by their board of directors or by a separate investment management company.

Open-ended investment companies may not perform other activities than:

- operating collective investments by placing financial resources in financial instruments (as provided by law) based on the risk diversification and prudent administration principle; and

- ensuring that the value of the titles for participation on a market does not vary significantly in relation to the value of the net unit asset.

The initial capital of investment companies managed by their board of directors must amount to at least the RON equivalent of €300,000.

Open-ended investment companies must request the trading admission on a regulated market within 90 days from the issuance of the FSA authorization.

## Alternative Investment Funds (AIFs)

Each AIF is administered by an AIF manager (AIFM) which may be an external manager. In case the AIF is self-administered, the provisions related to AIFMs are also applicable.

The AIFM must fulfil the following requirements:

- it must be authorized by the FSA; and
- in order to be authorized:
  - the AIFM must have initial share capital and sufficient own funds in accordance with the law;
  - the persons who effectively manage the AIFM must have the reputation or necessary experience as required by the FSA;
  - the day-to-day management must be ensured by at least two persons meeting such conditions;
  - the AIFM shareholders that have qualifying holdings must meet the requirements of the need to ensure sound and prudent management of the AIFM; and
  - the head office and registered office of the AIFM must be located in Romania.

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## What are common fund structures?

Common forms of funds include:

- Undertakings for Collective Investments In Transferable Securities;
- Alternative Investment Funds; and
- financial investment companies.

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## What are the differences between offering fund securities to professional / institutional or other investors?

Participative titles issued by Alternative Investment Funds (AIFs) which are authorized in other member states can be offered to retail investors in Romania only if those AIFs observe the conditions of the investment limits and reporting, transparency and publicity requirements currently applicable to Other Collective Investment Undertakings (OCIUs) which attract financial resources publicly.

In addition to such conditions, participative titles which are issued by AIFs authorized in other member states and which may be offered to Romanian professional investors, may be distributed to Romanian retail investors only if the entities which perform the distribution are authorized to provide investment advisory services.

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## Are there any other notable risks or issues around establishing and investing in funds?

There are no specific risks except for the inherent risks corresponding to each type of fund.

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## Managing and marketing debt / hedge funds

### *Are there any restrictions on marketing a fund?*

#### Undertakings for Collective Investments In Transferable Securities (UCITS)

In the case of UCITS, marketing materials addressed to investors can only be made public following the approval by the Financial Supervisory Authority (FSA) of the prospectus and its publication.

UCITS authorized in an EU member state intending to market in Romania must complete and submit to its home regulator a notification including certain specified documents. The home regulator then completes a notification file which is sent in a regulator-to-regulator transmission, following which the UCITS can be sold in Romania.

#### Alternative Investment Funds (AIFs)

AIFs which are closed-ended investment funds attracting financial resources publicly can be marketed to the public following their registration with the FSA and following the FSA's approval.

Closed-ended investment funds which attract financial resources privately and are managed by an AIFM are not allowed to distribute any promotional materials to the public.

An AIFM authorized in an EU member state may distribute and market AIFs from an EU member state in Romania to professional investors on the basis of its authorization by the relevant EU member state regulator, under an EU passport. The distribution of participative titles in AIFs, as well as the marketing of those AIFs in Romania are subject to the passporting formalities which mainly require that the FSA is notified by the AIFM home member state regulator of the intention of the AIFM to distribute in Romania participative titles of AIFs from an EU member state.

As regards distribution and marketing to retail investors, in addition to the passporting formalities above, it is required that AIFs which are marketed in Romania comply with the Romanian legislation which sets up investment limits, reporting, transparency and marketing obligations applicable to Romanian AIFs which attract financial resources publicly.

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### *Are there any restrictions on managing a fund?*

The management of Undertakings for Collective Investments In Transferable Securities (UCITS) and Alternative Investment Funds (AIFs) is a regulated activity subject to authorization by the Financial Supervisory Authority (FSA).

Authorization of both investment management companies and AIF managers (AIFMs) is subject to a significant authorization process which may take up to six months starting from the completion of the application. Authorization requirements mainly refer to initial capital minimum levels, shareholders' financial soundness, expertise and integrity of management bodies, senior personnel requirements (must be suitable persons with adequate expertise and reputation), business plan and organization structure, policies and procedures.

AIFMs which were previously authorized by the FSA as investment management companies, are not required to refile the documents already submitted upon authorization as an investment management company.

The FSA authorization of an AIFM or an investment management company is valid for all EU member states based on the European passport. They may perform the financial services for which they are authorized by the FSA in another member state either by establishment of a branch or directly, under the direct provision of services.

Following authorization, investment management companies and AIFMs are subject to various regulatory requirements, including in relation to own funds, conflicts of interest, risk management policies and remuneration policies.

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## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

In order to trade, as a business, in their name and on their own account, in derivative financial instruments, such as futures contracts and options, a legal person must be authorized by the Financial Supervisory Authority (FSA) and registered with the FSA's Registry.

The [European Market Infrastructure Regulation](#) applies to all derivative transactions and requires transactions to be reported to regulators, transactions between dealers to be cleared or subject to other risk mitigation techniques such as initial margin and variation margin requirements.

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### *What are common types of derivatives?*

Derivative contracts are entered into in Romania for a range of reasons including hedging, trading and speculation.

Derivatives may be traded over-the-counter or on an organized exchange.

All of the main types of derivative contracts are used in Romania:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps); and
- options (call options and put options).

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying assets seen in Romania are:

- equity;
- indices;
- commodities; and
- foreign currency.

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### *Are there any other notable risks or issues around entering into derivatives contracts?*

Since the global financial crisis in 2007-to-2008, derivatives and particularly over-the-counter derivatives have attracted significant regulatory attention. The European Commission has sought in particular, to:

- enhance transparency by requiring the provision of comprehensive information on over-the-counter derivative position;
- reduce counterparty risk by increasing the use of central counterparty clearing; and
- improve the management of operational risk by increasing the standardization of derivatives contracts.

As a result, the derivatives market has seen and continues to see the introduction of a significant amount of new regulation and this has led to substantial compliance costs for market participants.

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## Debt finance



## Lending and borrowing

### *Are there any restrictions on lending and borrowing?*

#### Lending

Professional lending is a regulated activity, which may exclusively be undertaken by regulated entities. Depending on the type of loans being granted, various specific requirements or limitations should be considered.

By way of example, mortgage loans for real estate investments (*credite ipotecare pentru investitii imobiliare*) can be granted only by certain regulated entities (eg universal banks or mortgage loan banks). Moreover, the credit agreement for such type of loans must include certain information expressly required by law. There are also particular requirements on how to deal with borrowers that fall behind with their payments.

Specific rules are also provided under the law on consumer loans.

#### Borrowing

While borrowers are generally not regulated, it is advisable for borrowers to consider whether either the mortgage or consumer-lending regimes apply to their activities, in which case they will benefit from the protections mentioned above.

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### *What are common lending structures?*

Lending in Romania can be structured in a number of different ways, mainly depending on the complexity and the value of the transaction and, generally, the overall commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders, each providing parts of the overall facility).

Syndicated facilities, by their nature, involve more parties (such as agents and security agents which fulfil certain roles for the finance parties), as well as more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicates taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, project loans, acquisition loans, real estate loans or letter of credit facilities.

#### Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

#### Loan security

A loan can be either secured or unsecured. For more information, see [Giving and taking guarantees and security](#).

#### Loan commitment

In practice, a loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan (although in this case there may be certain legal issues to be considered).

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## ***What are the differences between lending to institutional / professional or other borrowers?***

In principle, lending to institutional or professional borrowers is more flexible, while lending in the context of mortgages and to consumers is subject to more regulatory oversight and is more cumbersome from a compliance perspective.

For more information, see [Lending and borrowing – restrictions](#).

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## ***Do the laws recognize the principles of agency and trusts?***

The Romanian Civil Code expressly recognizes the possibility to create a movable mortgage in favor of a third party (agent) designated by the secured creditor. Such agent shall exercise all rights of the secured creditor which appointed it. This concept is, however, provided by law only in case of movable mortgages (immovable mortgages are therefore excluded). In practice, however, such an agency mechanism is not that frequently used, due to its limited regulation.

Furthermore, Romanian law does not recognize the common law concepts of 'trusts' and 'trustee'. However, since October 2011, the Romanian Civil Code has introduced a concept similar to a trust, namely the *fiducia*. However, given the legal requirements related to the creation and registration of a *fiducia* (including tax related requirements), the *fiducia* is not commonly used in practice, particularly for taking security. Thus, in syndicated facilities security agents structures are commonly used.

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## ***Are there any other notable risks or issues around lending?***

Romanian law prohibits a Romanian company from making, directly or indirectly, loans to its directors or officers, or to spouses, certain relatives or in laws of such directors or officers, or to any companies in which such a person is director or manager, or holds 20% or more of the share capital. Transactions may be invalidated for this reason and there may also be criminal sanctions.

Insolvency-related limitations should also be taken into consideration. By way of example, Romanian insolvency law prohibits the acceleration of loans due to reasons related to the opening of insolvency proceedings against the borrower.

As a general note, Romanian law governed loan agreements and other finance documents are subject to general contractual lending principles. Depending on the lending transaction's size and type, loan agreements used on the Romanian market are usually based on the bank's standard form documentation (particularly in the case of bilateral loans and small transactions) or Loan Market Association (LMA)-style facility agreements (eg for syndicated loans).

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## ***Are there any other notable risks or issues around borrowing?***

Borrowing by Romanian residents from non-residents for a period exceeding one year is subject to notification to the National Bank of Romania for statistical purposes.

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## Giving and taking guarantees and security

### *Are there any restrictions on giving and taking guarantees and security?*

Some of the key areas affecting the giving of guarantees and security are as follows.

#### Corporate benefit and misuse of corporate assets

Upstream or cross-stream guarantees or security usually raise corporate benefit issues under Romanian law. Each guarantor or security provider must receive a real and adequate corporate benefit from assuming such guarantee obligations. Additionally, the absence of any corporate benefit may be construed as a lack of cause for the guarantee or security, with the risk of the respective guarantee or security agreement being invalidated on these grounds. Corporate benefit is, however, a matter of fact assessed on a case-by-case basis by the courts.

Furthermore, the directors or officers and the (founding) shareholders of a Romanian company are criminally liable if they intentionally misuse the assets (including moneys or loans) of the company for a purpose contrary to the company's interest or in its own interest or in order to favor another company in which such persons have a direct or indirect interest. As a consequence, if there is a misuse of corporate assets, the related transactions may also be invalidated.

#### Prohibition from securing loans granted to directors

Romanian law prohibits a (joint-stock) company to conduct credit activities to the benefit of its directors through various operations, including through the creation of security aimed at securing, totally or partially, any loans granted to the respective director(s). The same prohibition applies to operations in which the respective directors' spouses, certain relatives or in-laws are interested, as well as in case the security is granted to another company with which it shares one (or more) directors (or the directors which are relatives) or to any companies in which such a person is director or manager, or holds 20% or more of the share capital. Transactions may be invalidated for this reason and there may be also criminal sanctions. There are certain exemptions from this prohibition provided by Law No 31/1990 on companies.

#### Insolvency

Insolvency proceedings may have various impacts on receivables which are preferred by law and rank above any other receivables (eg privileges, mortgages, pledge over assets of the insolvent debtor) and the creditors which have such type of receivables. By way of example, following the commencement of insolvency proceedings, all court and out-of-court actions or enforcement measures for the settlement of claims over the debtor are suspended by operation of law. Also, security created for a prior, existing, but unsecured receivable, within the six month period prior to the opening of insolvency proceedings may be invalidated. Similarly, fraudulent acts committed by a debtor during the two years preceding the commencement of insolvency proceedings may also be invalidated.

#### Financial assistance

According to Law No 31/1990 on companies, a (joint-stock) company cannot create any security in favor of another party in order for such other party to acquire that company's own shares. Breach of this rule renders the guarantee null. Such prohibition is not applicable to transactions carried out in the ordinary course of business of credit institutions or any other financial institutions or to transactions carried out with a view to acquiring shares by or for that company's employees, provided that such transactions do not trigger the reduction of the net assets of the company below the aggregated value of the subscribed share capital and the reserves that cannot be distributed according to law or constitutive act.

#### Corporate approvals

The borrower should ensure that it has in place all necessary corporate approvals taken at the approval level required by its articles of association and other applicable corporate decisions setting forth the competences of its corporate bodies. In practice, these are either a shareholders' resolution or a board decision. In case of a joint-stock company, a shareholders' resolution is mandatory if the facility exceeds 50% of the book value of the assets of the respective joint-stock company.

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## What are common types of guarantees and security?

Romanian law regulates two main types of guarantees/security: personal guarantees and *in rem* security.

### Personal guarantees

The most common ones are:

- suretyship (*fideiussione*); and
- autonomous guarantees (which, in their turn, may take the form of:
  - letters of guarantee; and
  - letters of comfort).

### *In rem* security

The most commonly available *in rem* security are (conventional) mortgages, which do not entail the dispossession of the security provider. Depending on the type of assets taken as security, mortgages can be either:

- **movable mortgages** – covering various tangible or intangible, present and future movable assets (by way of example, a movable mortgage may be created over bank accounts, shares, receivables, intellectual property rights, insurance policies rights, machinery, inventory, universalities of movable assets which are assigned to the activity of an enterprise etc); or
- **immovable mortgages** – covering immovable assets together with their accessories, superficies rights etc (the Romanian Civil Code expressly recognizes the possibility to create an immovable mortgage over future buildings).

Romanian law also regulates privileges, which are claims preferred by law and which have in principle the highest rank. Privileges can be either general (over all movable and immovable assets of the debtor) or special (eg the privilege of the seller's claim for the unpaid price of a movable asset sold to a natural person, save for the case when the buyer acquires the asset for the service or exploitation of an enterprise). There are special priority rules provided by the law with respect to privileges and mortgages.

Furthermore, quasi-security may also be used in practice, such as assignment of receivables for security purposes (*cesiune de creanta in scop de garantie*), retention of title (*clauzele de rezerva a proprietatii*). They are subject to the same priority and enforcement rules as those provided by law for mortgages.

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## Are there any other notable risks or issues around giving and taking guarantees and security?

### Giving or taking personal guarantees

Suretyship is fairly common in lending transactions in Romania. It is an agreement whereby the guarantor undertakes to the creditor to fulfil the obligations of the debtor (either on a free-of-charge basis or against a consideration) in case the latter fails to comply with such obligations. The suretyship cannot be presumed, it must be specifically undertaken by way of a written agreement concluded either as an authentic deed (in front of a notary public) or as a private deed or, in certain cases, even included in the facility agreements. There are specific legal conditions that need to be observed by the guarantor (eg to have and maintain sufficient assets in Romania to cover the secured liabilities, to be domiciled in Romania), however, these rules do not apply in case a certain provider of the suretyship was specifically requested by the creditor.

There are no registration formalities provided by the law for suretyships.

### Giving or taking *in rem* security

Immovable mortgages are subject to certain formal requirements which render them valid and enforceable against third parties. Specifically, immovable mortgages can only be created through an agreement authenticated by a notary public, subject to payment of



notarial fees. Immovable mortgages must be registered with the land book where the mortgaged real estate is registered, subject to payment of registration fees.

As concerns movable mortgages, they are validly created through movable mortgage agreements concluded either as private deeds or as authenticated deeds. The ranking of a movable mortgage is generally given by the registration with the so-called Electronic Archive for Movable Security (*Arhiva Electronica de Garantii Reale Mobiliare*). Such registration is valid for a five-year period and may be renewed before its expiry. Depending on the specific type of mortgaged assets, other registration formalities may apply (eg registration with the shareholders' registry in case of mortgages over shares, the creation of 'control' over the mortgaged bank accounts etc).

As a general requirement, a mortgage agreement (either movable or immovable) is not valid unless the amount for which the mortgage is created can reasonably be determined on the basis of the mortgage agreement. Also, under the sanction of nullity, the mortgage agreement must include a sufficiently precise description of the mortgaged asset, reasonably allowing its identification. The mortgaged assets may be described by drafting a list of the mortgaged movable assets, by determining the category to which they belong, by indicating their quantity, by providing a formula for their determination or by any other method which reasonably allows their identification. In the particular case of mortgages over bank accounts, for validity purposes the respective bank accounts must be expressly set out under the movable mortgage agreement.

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## Financial regulation

### Law and regulation

#### *What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

##### Credit institutions

Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy (*Ordonanta de urgenta nr. 99/2006 privind institutiile de credit si adecvarea capitalului*) (taking up and pursuit of the business of credit institutions)

National Bank of Romania (NBR) Regulation No 5/2013 on prudential requirements for credit institutions (*Regulamentul nr. 5/2013 privind cerinte prudentiale pentru institutiile de credit*) (prudential requirements for credit institutions)

Law No 312/2015 regarding the recovery and resolution of credit institutions and investment firms, as well as for amending and completing certain regulations in the financial field (*Legea nr. 32/2015 privind redresarea si rezolutia institutiilor de credit si a firmelor de investitii, precum si pentru modificarea si completarea unor acte normative in domeniul financiar*) (recovery and resolution of credit institutions and investment firms)

NBR Regulation No 4/2014 on reporting statistic data and information to the National Bank of Romania (*Regulamentul nr. 4/2014 privind raportarea de date si informatii statistice la Banca Nationala a Romaniei*) (reporting for statistic purpose of financial data and information to the National Bank of Romania by credit institutions, non-banking financial institutions, investment firms or other reporting entities)

NBR Regulation No 4/2005 on the foreign exchange regime (*Regulamentul nr. 4/2005 privind regimul valutar*) (foreign exchange regime)

##### Non-banking financial institutions

Law No 93/2009 regarding non-banking financial institutions (*Legea nr. 93/2009 privind institutiile financiare nebancaire*) (taking up and pursuit of the business of non-banking financial institutions)

Regulation No 20/2009 regarding non-banking financial institutions (*Regulament nr. 20/2009 privind institutiile financiare nebancaire*) (registration, communication of changes occurred in the status of non-banking financial institutions and prudential requirements applicable to non-banking financial institutions)

##### Consumer credit

Government Emergency Ordinance No 52/2016 on credit agreements for consumers relating to immovable property, as well as for amending and supplementing the Government Emergency Ordinance No 50/2010 on credit agreements for consumers (*Ordonanta de urgenta nr. 52/2016 privind contractele de credit oferite consumatorilor pentru bunuri imobile, precum si pentru modificarea si completarea Ordonantei de urgenta a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori*) (credit agreements for consumers relating to immovable property, prudential and supervisory requirements (including for the establishment and supervision of credit intermediaries and debt recovery entities), aspects regarding the provision of ancillary services)

Government Emergency Ordinance No 50/2010 on credit agreements for consumers (*Ordonanta de urgenta a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori*) (credit agreements for consumers)

Government Ordinance No 21/1992 on consumer protection (*Ordonanta nr. 21/1992 privind protectia consumatorilor*) (consumer protection)

## Mortgages

Law No 287/2009 regarding the Civil Code (*Legea nr. 287/2009 privind Codul Civil*) (Civil Code of Romania)

Law No 77/2016 on giving in payment of real estate assets for discharging loan debts (*Legea nr. 77/2016 privind darea in plata a unor bunuri imobile in vederea stingerii obligatiilor asumate prin credite*) (giving in payment of real estate assets for discharging loan debts – *datio in solutum*)

Law No 190/1999 regarding mortgage loans for real estate investments (*Legea nr. 190/1999 privind creditul ipotecar pentru investitii imobiliare*) (mortgage credits for real estate investments)

## Corporations

Companies Law No 31/1990 (*Legea societatilor comerciale*) (legal regime of companies)

## Funds and platforms

Law No 297/2004 on the capital market (*Legea nr. 297/2004 privind piaa de capital*) (capital market)

Law No 74/2015 on alternative investment fund managers (*Legea nr. 74/ 2015 privind administratorii de fonduri de investitii alternative*) (alternative investment fund managers)

Government Emergency Ordinance No 32/2012 on undertakings for collective investment in transferable securities and investment management companies and for amending and supplementing Law No 297/2004 on the capital market (*Ordonana de urgen nr. 32/2012 privind organismele de plasament colectiv în valori mobiliare i societile de administrare a investiilor, precum i pentru modificarea i completarea Legii nr. 297/2004 privind piaa de capital*) (undertakings for collective investment in transferable securities and investment management companies)

Financial Supervisory Authority (FSA) Regulation No 9/2014 on the authorization and operation of investment management companies, undertakings for collective investment in transferable securities and depositaries of undertakings for collective investment in transferable securities (*Regulamentul ASF nr. 9/2014 privind autorizarea i funcionarea societilor de administrare a investiilor, a organismelor de plasament colectiv în valori mobiliare i a depozitarilor organismelor de plasament colectiv în valori mobiliare*) (authorization and operation of investment management companies, undertakings for collective investment in transferable securities and of the depositaries of undertakings for collective investment in transferable securities)

National Securities Commission (NSC) Regulation No 15/2004 on the licensing and functioning of investment management firms, collective investment undertakings and depositaries (*Regulamentul CNVM nr. 15/2004 privind autorizarea i funcionarea societilor de administrare a investiilor, a organismelor de plasament colectiv i a depozitarilor*) (licensing and functioning of investment management firms, collective investment undertakings and depositaries)

FSA Regulation No 10/2015 on alternative investment funds management (*Regulamentul ASF nr. 10/2015 privind administrarea fondurilor de investitii alternative*) (alternative investment funds management)

## Other key market legislation

Government Ordinance No 9/2004 on financial collateral agreements (*Ordonana nr. 9/2004 privind unele contracte de garantie financiar*) (financial collateral agreements)

Law No 304/2015 regarding the issue of mortgage covered bonds (*Legea 304/2015 privind emisiunile de obligatiuni ipotecare*) (issue of mortgage covered bonds)

NSC Regulation No 32/2006 on financial investment services (*Regulamentul nr. 32/2006 privind serviciile de investitii financiare*) (financial investment services)

[Capital Requirements Regulation \(Regulation \(EU\) 575/2013\) \(capital requirements\)](#)

[European Market Infrastructure Regulation \(Regulation \(EU\) 648/2012\) \(derivatives\)](#)

[Market Abuse Regulation \(Regulation \(EU\) 596/2014\) \(market abuse\)](#)

*Last modified 20 Oct 2017*

## Regulatory authorization

### *Who are the regulators?*

The main regulator in the banking sector is the National Bank of Romania (NBR) which is the Romanian central bank. The NBR has, *inter alia*, authorization, prudential supervising and regulatory competences in relation to credit institutions.

The Financial Supervisory Authority (FSA) is the regulatory and supervisory body responsible for capital markets. The FSA's role includes authorizing investment firms, management companies and investment funds, providing the general listing requirements for issuers, regulating the securities exchange and enforcing the market abuse regulations.

*Last modified 20 Oct 2017*

### *What are the authorization requirements and process?*

Depending on its type, an entity must apply to the National Bank of Romania (NBR) or the Financial Supervisory Authority (FSA) for authorization.

### Credit institutions and non-banking financial institutions

Romanian credit institutions (as well as the branches of credit institutions from third (non-EU/ European Economic Area) states must be authorized by the NBR when performing a regulated activity in Romania. The authorization process comprises two stages, namely the:

- approval of the establishment of the respective credit institution; and
- authorization of the functioning of such credit institution.

The NBR will also approve key individuals (eg senior management) in their roles at the level of the respective credit institution.

The NBR must approve or reject a request for authorization within four months of the application. Such term may be suspended in certain cases provided by law. Authorized credit institutions are registered with a special register maintained by the NBR.

Also, Romanian non-banking financial institutions (NFIs) (as well as subsidiaries established in Romania by foreign NFIs) may perform lending activities in Romania only after registration with the NFI General Registry or, as applicable, the NBR Special Registry, maintained by the NBR. Such registration is performed by the NBR upon notification of the establishment of the respective NFI (which must be performed within 30 days of the NFI registration with the Romanian Trade Register) and submission of the required documentation.

### Investment firms and investment vehicles

Both investment firms and investment vehicles must apply to the FSA for authorization.

In order to be licensed by the FSA, investment firms must satisfy the required conditions including:

- the initial capital must amount to at least the RON equivalent of €730,000; and
- the day-to-day management must be carried out by at least two persons, who are also empowered to represent the investment firm.

*Last modified 20 Oct 2017*

## ***What are the main ongoing compliance requirements?***

Threshold conditions (such as having adequate own funds and compliance arrangements in place) are an ongoing compliance requirement for credit institutions, non-banking financial institutions, investment firms, investment vehicles and fund managers.

Failure to comply with the threshold conditions and more detailed regulatory rules can result in sanctions for regulated entities, such as written warning, fines, temporary suspension of the respective entity's authorization or even prohibition from performing the authorized activity.

*Last modified 20 Oct 2017*

## ***What are the penalties for failure to be authorized?***

A person undertaking a regulated activity consisting of lending activities, investment services or other activities specific to credit institutions, investment firms and/or investment vehicles, without being authorized, commits a criminal offence and may be liable to imprisonment.

*Last modified 20 Oct 2017*

## **Regulated activities**

### ***What finance and investment activities require authorization?***

As a general rule, the performance without authorization of any activities or operations for which the laws regulating the financial sector require authorization is prohibited and, in most cases, gives rise to criminal liability.

Under Romanian law, it is generally prohibited for any individual or legal entity (other than a credit institution) to pursue activities such as attracting deposits or other repayable funds from the public.

Furthermore, professional lending is a regulated activity, which may exclusively be undertaken by regulated entities, such as credit institutions, non-banking financial institutions or payment services providers which perform lending activities in relation to payment services.

Offering investment services and managing investment vehicles are also comprehensively regulated activities, and require authorization by the Financial Supervisory Authority.

*Last modified 20 Oct 2017*

### ***Are there any possible exemptions?***

Individuals or legal entities that are not credit institutions are not permitted to carry on activities such as taking deposits or other repayable funds from the public. This prohibition is not applicable to taking of deposits or other funds repayable by a member state of the EU, or by a member state's regional or local authorities, or by public international bodies provided that one or more member states are members to the public international body. The prohibition also does not apply to cases expressly covered by national or EU legislation, provided that those activities are subject to regulations and controls intended to protect depositors and investors, and applicable to those cases.

To the extent that lending activities are performed incidentally and not on a professional basis, they may be freely undertaken by any individual or entity (not necessarily by regulated entities). The National Bank of Romania has a monopoly in determining, on a case-by-



case basis, whether a determined activity constitutes professional lending, by applying the criteria provided by Law No 93/2009 regarding non-banking financial institutions.

*Last modified 20 Oct 2017*

## *Do any exchange controls or other restrictions on payments apply?*

There are certain general foreign exchange rules provided by Romanian law. By way of example, making or receiving payments, transfers and any other similar operations arising out of the sale of assets, or the provision of services between Romanian residents must be made only in Romanian currency (ie RON), except for certain specific operations, as provided by law, which may also be performed in other currencies. Operations between residents and non-residents can be performed either in Romanian currency or in a foreign currency.

In addition, there are certain threshold limitations for monetary transactions provided under the anti-money laundering law which may trigger various reporting obligations (eg for cash transactions involving amounts of at least the RON equivalent of €15,000, or for external transfers made in or from accounts and amounting to at least the RON equivalent of €15,000).

Statutory blacklists operate to prohibit, or restrict funds being sent to, or received from, persons in certain countries.

Also, certain reporting requirements apply to loans received by Romanian residents from non-residents.

Compliance with the EU rules on payments (EU Payments Regulation and the Transfer of Funds Regulations) must also be ensured. Furthermore, there are specific rules provided by the law for cash transactions between legal entities and other persons.

*Last modified 20 Oct 2017*

## *What are the rules around financial promotions?*

There are various legal requirements applying to financial promotions and marketing.

For example:

- Any advertising concerning credit agreements for consumers must include certain standard information and be presented in a certain way.
- There are specific rules on credit agreements for consumers relating to residential immovable property.
- Long distance contracts regarding financial services (eg banking services, credit-related services, financial investments services, etc) are subject to various rules regarding the information to be provided to consumers who are entering into such contracts.

There are also specific rules around marketing materials for Undertakings for Collective Investments In Transferable Securities (UCITS).

*Last modified 20 Oct 2017*

## **Entity establishment**

### *What types of legal entity are generally used to undertake financial or investment activity?*

#### **Generally**

The most common types of legal entities in the financial sector are joint-stock companies and limited liability companies. They are subject to relatively straightforward rules and their shareholders benefit, in general, from limited liability (up to the amount of the subscribed capital). Unlike limited liability companies, joint-stock companies may be listed on regulated markets and have a more complex organization.

Certain financial activities can only be performed by entities set up in a particular type of legal entity (eg credit institutions and NFIs can only take the form of a joint-stock company).

## Investment firms and investment vehicles

Investment firms are set up in Romania as joint-stock companies whose object of activity is to perform investment services.

Open-ended investment funds are created on the basis of a simple partnership contract, they have no legal personality and are managed by an investment management company, which must be incorporated as a joint-stock company.

Open-ended investment companies are set up as joint-stock companies and may be managed either by their board of directors or by a separate investment management company.

Closed-ended investment funds are established on the basis of a simple partnership contract and are managed by an investment management company.

Closed-ended investment companies are established as joint-stock companies. The management of the closed-ended investment company is ensured either by its own board of directors or by a separate investment management company.

Financial investment companies are a special type of closed-ended investment companies. They are joint-stock companies the shares of which are then traded on the Bucharest Stock Exchange and are subject to the same rules as the closed-ended investment companies.

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## *Is it possible to conduct lending or investment business through a branch or establishment?*

Yes.

Lending and/or financial investment services may be performed in Romania on a professional basis by, *inter alios*:

- credit institutions (or payment services providers) and investment firms, respectively, which are licensed in an European Economic Area member state to perform lending/financial investment services and which carry out such services in Romania either:
  - directly (under the freedom to provide services); or
  - by way of establishment of a Romanian branch (under the freedom of establishment) based on a (banking) license obtained in their home member state, without the need to obtain a (banking) license in Romania (they are, however, subject to performing certain administrative formalities (the so called 'passporting' formalities)); and
- Romanian branches of non-European Economic Area member states licensed (credit) institutions (to the extent the Romanian branches were licensed in Romania by the National Bank of Romania or the Financial Supervisory Authority, respectively).

*Last modified 20 Oct 2017*

## FinTech

### FinTech products and uses

#### *What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

#### Peer to peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through an electronic bank lending platform established as a specialist corporate or special purpose vehicle based structure;

- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform.

In Romania, peer-to-peer (P2P) funding platforms are not popular. However, there is one intermediary platform which operates as an internet-based intermediary between natural persons who can offer and request loans; a couple of similar platforms are being developed and we anticipate evolution in the field (alongside the currently more popular crowdfunding platforms).

## Blockchain, smart contracts and cryptocurrencies

The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

While the use of both of bitcoin and blockchain technology is expected to become mainstream, Romania has yet to embrace this global trend. According to data released in March by Netopia mobilPay, Romanians made payments in bitcoin equivalent to €300,000 in 2016. The average payment value per was €400.

Currently, there are no specific regulations concerning bitcoin in Romania. The National Bank of Romania has taken a reserved attitude towards blockchain technology and bitcoin; reflecting the perspective of the European Central Bank. In March 2015, the National Bank of Romania issued a statement in relation to cryptocurrencies confirming that they are considered neither national, nor foreign currency and may not be considered e-currency either, which leads to an argument that bitcoin falls under the category of movable goods and, as a result, any transaction which applies a bitcoin 'payment' may qualify as barter trading, in accordance with article 1763 of the Romanian Civil Code.

## Initial coin offerings and token based products

Issuing digital tokens by way of an initial coin offering (ICO) is not common practice in Romania. However, there are startup projects, including in the video gaming market sector, which have raised financing by means of an ICO. Issuance of tokens to fundraise in the video gaming market (where such tokens may be used for purchases within the game as well as being exchangeable in other cryptocurrency markets) is expected to grow and may be copied by issuance of so-called utility (discount) tokens in other market sectors.

## Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Based on a recent study in Romania, 60% of the financial intermediaries interviewed mentioned that the main reason for using AI interfaces was data collection. On the other hand, the study also highlighted that concerns about the privacy of data are one of the main challenges to further development, as well as a preference for human interactions. The survey also found that although the number of human interactions at banks or telephone offices is decreasing and is likely to continue in line with this trend, the quality and importance of human contact will increase.

## Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

Cloud computing is most commonly used in the financial sector for the following services:

- internet banking platforms; and

- outsourcing activities with respect to services previously carried out by the financial institution (eg electronic archiving, e-mailing services etc).

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## ***Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?***

### **General financial regulatory regime**

As a general rule, performing any activities or operations for which the laws regulating the financial sector require authorization, is prohibited without the appropriate authorization and, in most cases, doing so gives rise to criminal liability.

Under Romanian law, it is generally prohibited for any individual or legal entity (other than an appropriately licensed credit institution) to pursue activities such as deposit-taking (or holding other repayable funds from the public). Furthermore, professional lending is a regulated activity, which may only be undertaken by regulated entities, such as licensed credit institutions, non-banking financial institutions or payment services providers that perform lending activities in relation to payment services.

Payment services can only be performed either by an authorized payment institution (together with credit institutions, e-money institutions) or authorized agents of one of the above.

Money remittance services are similarly regulated and all such credit institutions, payments services institutions and e-money institutions must be authorized by and registered with the National Bank of Romania.

The offering of investment services and managing investment vehicles are also comprehensively regulated activities, and require authorization by the regulator.

### **Electronic payments platforms and regulation of peer to peer lenders**

#### **ELECTRONIC PAYMENT PLATFORMS**

A number of FinTech businesses are offering electronic payment platforms to rival the traditional payment systems. These are mostly payment services institutions authorized in another European Union member state which provide payment services in Romania by passporting their home license (either directly or via local branches).

#### **PEER TO PEER LENDERS**

Peer-to-peer (P2P) lending is not yet regulated in Romania. The local market remains undeveloped, however, lending via crowdfunding platforms has begun to develop in recent years and draft legislation has been produced but is not yet implemented. It is expected that P2P lending platforms will grow alongside this sector.

### **Regulation of payment services**

Where an entity provides payment services on a professional basis in Romania, it will require authorization by the National Bank of Romania to become an authorized payment institution under the Payment Services Ordinance No 113/2009 implementing the European Union Payment Services Directive I. Failure to obtain the required authorization is a criminal offence. Furthermore, payment services may also be performed by authorized credit institutions as well as by other authorized institutions, such as credit institutions or e-money institutions.

In order to become authorized by the National Bank of Romania, a payment services business will need to meet certain criteria, including in relation to its business plan, regulatory capital, requirements, processes and procedures in place for safeguarding relevant funds and money laundering controls.

### **Application of data protection and consumer laws**



Law No. 677/2001 'on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data' (Law 677/2001) regulates the processing of personal data in Romania. Law 677/2001 implements the European Data Protection Directive. Where a business determines the purposes and manner in which any personal data is processed, it will be regulated by Law 677/2001 and have certain notification and compliance obligations.

In addition, the European General Data Protection Regulation (GDPR) will replace the existing law with effect from 25 May 2018. The GDPR is more prescriptive and restrictive and includes mandatory notification requirements where a breach occurs, together with severe monetary sanctions for breach.

## Money laundering regulations

Law No 656/2002 'on the Prevention and Sanctioning of Money Laundering and Countering the Financing of Terrorism' gives the National Bank of Romania responsibility for supervising the anti-money laundering obligations of entities that offer certain services, such as lending, providing payment services and issuing and administering other means of payment.

Generally, where a legal entity is supervised by the National Bank of Romania, it will also be supervised by the same authority for compliance with anti-money laundering requirements. The same is provided in the draft law for the implementation of the European Union's Fourth Money Laundering Directive, not yet implemented in Romania.

*Last modified 20 Oct 2017*

## What type of funding arrangements and incentives are available to FinTech businesses?

### Early stage

#### SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

#### CROWDFUNDING

Crowdfunding may be appropriate for a FinTech business in the early stages. This involves members of the public investing in a business by pooling their resources through an intermediary platform, such as Crowdcube or Crowdfunder.

There are two main types of crowdfunding: equity and reward-based.

- Equity-based crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

Lending via crowdfunding platforms has begun to develop in recent years, but the local market remains immature. Most of the platform providers are organized as foundations and the fundraisers are usually non-profit organizations or natural persons. Generally, they are structured to function on the basis of donations received by the fundraiser and rewards (in the form of services or products) provided at a later date to the donors. The types of projects which have successfully raised the proposed financing are usually arts and technology orientated.

A legislative initiative for the enactment of a law on crowdfunding was launched during 2015. The draft has been approved by the Romanian parliament first chamber and it is currently under discussion in front of the second chamber (the Deputies House). Once

implemented, the draft law will regulate both equity-based crowdfunding as well as credit-based crowdfunding. Donation-based crowdfunding structures are expressly excluded from the scope of the draft law and it is expected that these types of platforms will continue to function as they currently do. Reward-based crowdfunding is not mentioned expressly.

#### ACCELERATORS

There are various tech events or accelerators in the Romanian market which offer support, facilities and funding for startups, often in return for an equity stake. In 2016 there were almost 200 startups financed in this way in Romania. These 'angel advisors' help startups not only with funding but also with mentoring and guidance.

### Venture capital

Venture capital (VC) funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. VC provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

VC funding is being used more frequently by FinTech companies in the first years of their existence, with 20 startups in Romania raising €11.3 million in total in 2016. For example, Vector Watch (owned by Romanian entrepreneurs and recently acquired by the global wearable giant Fitbit) raised €5 million in 2015. Also, a Romanian robotic form-scanning software company, UiPath has raised \$30 million in venture funding, marking one of the largest early-stage tech investments in Central Europe.

### Warehouse and platform funding

Another alternative form of funding is by way of peer-to-peer (P2P) lending platforms, which bring individual borrowers and lenders together without the involvement of traditional banks. P2P lending does not involve equity investments, and instead interest is paid on the money borrowed. In the Romanian market, some foreign P2P lending platforms are used by both Romanian investors and borrowers and a leading non-bank mortgage loan originator in Romania (Extra Finance) recently joined the Mintos marketplace. Domestic P2P lending platforms are also being developed.

### Senior bank debt and capital markets funding

#### SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding, which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

#### CAPITAL MARKETS FUNDING

While more common in other jurisdictions, FinTech fundraising by way of an Initial Public Offering or loan securitization have not, to our knowledge, been used as yet in Romania.

*Last modified 20 Oct 2017*

## Portfolio sales

### Loan transfers and portfolio sales

#### *What are common ways of buying and selling loans?*

Romanian law provides for various legal mechanisms for transferring rights and obligations, including those under loan agreements. The most common methods for transferring loans are as follows.

#### Assignment of receivables

The assignment occurs by the mere convention between the owner of certain receivables (assignor) and the buyer of those receivables (assignee), following which the assignee acquires:

- the receivables and all rights held by the assignor in relation to the assigned receivables; as well as
- all (assignable) security/guarantees and other rights accessory to the assigned receivables.

In principle, the consent of the assigned debtor is not required, except for cases when, depending on circumstances, the respective receivables are 'essentially linked to the creditor (assignor)', ie it can be enforced by the creditor only. The enforceability of the assignment of receivables against third parties, including the assigned debtor is achieved upon fulfilment of certain formalities, such as:

- written notice of the assignment to the assigned debtor(s), or written acknowledgement of the assignment signed by the assigned debtors, bearing a certain date; and
- registration of the assignment with the Romanian Electronic Archive for Movable Security (*Arhiva Electronica de Garantii Reale Mobiliare*).

## Assignment of contract

This is a mechanism introduced by the Romanian Civil Code (in force as of 1 October 2011). It allows a party to a contract to be replaced by a third party in that contract provided that the initial contractual parties have not yet fulfilled all their obligations under the respective contract and the counterparty agrees to such replacement. The assignment agreement and the acceptance of the assignment by the counterparty must be concluded in the form prescribed by law for the validity of the assigned contract.

## Novation

The novation option implies the extinguishment of the existing contractual relationship and the creation of a new one. The novation may be achieved in three different ways, namely:

- The debtor undertakes a new obligation towards the creditor, which replaces and extinguishes the initial obligation.
- A new debtor replaces the initial debtor, the latter being released from its obligations towards the creditor.
- A new creditor replaces the initial one, the debtor being released from its obligations towards the initial creditor.

As a general principle, the security or guarantees securing the initial receivable are not maintained unless expressly agreed by the parties.

## Subrogation

This mechanism operates when a third party pays instead of the debtor (eg borrower) and is subrogated to the creditor's rights against the debtor.

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## What are the main considerations when transferring a loan and related security?

Recent legislative developments brought some changes to the legal regime applied to the transfer of loans, including on the consumer-lending side. Before 30 September 2016, the rule provided by law was that portfolios of loans originated by financial institutions could be acquired only by regulated entities (eg credit institutions, non-banking financial institutions and payment services providers (granting loans related to the payment services)). However, such rule did not apply if the loans were deemed as 'losses' within the meaning of Romanian regulations regarding credit classification.

After 30 September 2016, such legal provisions were expressly repealed and we are currently lacking an express legal provision dealing with acquisition of loans in general. However, the National Bank of Romania has recently issued a communication stating that, to the extent the activity to be performed by the acquirer of loans in relation to the acquired loans represents crediting activities performed on a professional basis, the acquirer must be a regulated entity. Further, the National Bank of Romania concluded that the acquisition of loans granted to individuals and legal entities, which are deemed as 'losses' within the meaning of Romanian regulations regarding credit classification, does not represent a crediting activity performed on a professional basis and, therefore, can also be performed by other persons than regulated entities.

Further, specific rules regarding the acquisition of consumer loans (including non-performing loans) are provided by law.

In addition, various other issues may need to be considered in the context of transferring a loan or a portfolio of loans, the potential limitations being usually revealed in the course of the due diligence process conducted in such loans acquisition deals. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser or whether additional measures might need to be implemented in order to ensure compliance with data privacy limitations;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms;
- **consent** – whether a transfer requires the consent or notification of any other parties; and
- **formalities in relation to the security** – in case of secured loans, additional formalities regarding security interests and personal guarantees securing the transferred loan(s), may be applicable depending on the relevant security package (in general, the new secured creditor must be registered with the relevant public registers – eg the Land Book in case of immovable mortgages, or the Electronic Archive for Movable Security in case of movable mortgages – for opposability purposes).

*Last modified 20 Oct 2017*

## Projects

### Financing / investing in energy / infrastructure

#### *To what extent are energy and infrastructure assets publicly or privately owned?*

##### Generally

The ownership of energy and infrastructure assets in Romania varies as follows:

##### Oil and gas

The oil and gas industry is privatized especially in the sectors of oil and gas downstream and upstream. Most of the assets in the oil industry are privately owned, except those which are included in the public domain such as: underground resources, energy transmission assets, oil and gas pipelines, water storages and dikes.

The gas midstream is owned by the Romanian state through the national company Transgaz.

##### Electricity

Most of the companies involved in the generation, transmission and distribution of electricity are state owned (as either majority or full owner) and some of them are listed on the Bucharest Stock Exchange. However, the regional electricity companies which supply electricity to the off takers are privatized.

ANRE (National Authority for Regulation in the Energy Field) is the regulatory and supervision authority in the electrical energy and gas field and OPCOM is the administrator of the electrical energy market.

##### Telecoms infrastructure

The telecommunications networks (fixed and mobile) in Romania are mostly privately owned by a number of international and local service providers. Certain assets – such as frequency spectrums and the telecommunication transportation and distribution networks – are in the public domain.

ANCOM (National Authority for Administration and Regulation in Communication) is the administration authority of the communication market.

## Transport infrastructure

### LIGHT RAIL

Typically, light rail assets (such as trams) are owned by local public sector. The Bucharest underground infrastructure, network and trains are owned by the Romanian state through the Ministry of Transport.

### HEAVY RAIL

The rail network and infrastructure in Romania is owned by the Romanian state. There are only few small companies which operate trains on some rail routes, especially commercial trains.

The rail sector is regulated by the Office of Rail and Road (ORR).

### AVIATION

While the operators are both publicly or private owned, the airports infrastructure is owned by the Romanian state.

## Other infrastructure

### SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, EMERGENCY SERVICES CENTERS/PRISONS)

Typically, these are owned by the public sector with the exception of few hospitals and schools which are in the private sector.

### DEFENSE

Defense assets are owned by the public sector.

### WASTE

While in few municipalities facilities such as landfills, collection and transportation of the waste are in the private sector, the local public entities are still operating such facilities in most of the cities.

*Last modified 20 Oct 2017*

## *Are there special rules for investing in energy and infrastructure?*

In Romania there are no specific regulations permitting or restricting investments in energy or infrastructure. Depending on the type of investment and the area in which such is envisaged to be made, various legal provisions may be applicable throughout the various stages of the investment, for example:

- corporate and civil law provisions applicable with respect to the setting-up of the investment vehicle, acquisition/sale of control in the investment vehicle, joint ventures etc;
- public procurement regulations in case of investments undertaken by public authorities or certain types of companies (such as energy-producing companies), which regulate aspects such as initiation of the investment, procurement of works, products and services related to the investment etc;
- legislation regarding European funds or state aid schemes, to the extent these are used for the funding of the investment; and
- general regulatory provisions related to design, construction, commissioning and operation of an investment project, including construction provisions, environmental provisions etc.

Special regulatory provisions are applicable for each category of project in energy (eg electricity, nuclear and thermal energy production investment projects) or infrastructure (telecommunications, railway and road infrastructure investment projects).

*Last modified 20 Oct 2017*

## *What is the applicable procurement process?*

Public procurement in Romania is, for the time being, regulated by several laws enacted in 2016 aimed to transpose into Romanian legislation the EU public procurement reform, as follows:

- Law on Public Procurement transposing Directive 2014/24/EU on public procurement;
- Law on Sectorial Acquisitions, transposing Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors;
- Law on Concessions of Works and Concessions of Services, transposing Directive 2014/23/EU on the award of concession contracts; and
- Law on Remedies and Appeals Related to Awarding of Public Procurement Contracts, Sectorial Contracts and Works Concession Contracts and Services Concession Contracts, as well as regarding the organization and functioning of the National Council for Solving Complaints, transposing Directive 89/665/EEC on application of review procedures to the award of public supply and public works contracts and Directive 92/13/EEC on application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

The key principles are that contracts procured by the public sector are awarded fairly, transparently and without discrimination on the grounds of nationality and that all potential bidders are treated equally. They also set out the principle of proportionality and assumption of responsibility.

The award of the contract is determined on a more complex basis, with the sole awarding criterion being the 'most economically advantageous tender', which is determined by reference to price or cost, price-quality and/or cost-quality ratio.

Public procurement is relevant where the central authorities, public institutions, local public authorities, local public institutions or State-owned companies, are seeking to outsource delivery of a new project. On an infrastructure project, a potential investor would have to bid in its own capacity or as part of a consortium to deliver the overall deal which could include design, build, operation, maintenance and financing of the relevant energy or infrastructure asset.

The thresholds triggering application of public procurement rules are as follows:

- RON 23,227,215 (approximately €5.186 million) for public works contracts;
- RON 600,129 (approximately €134,000) for public service contracts; and
- RON 3,334,050 (approximately €750,000) for public service contracts for social and other specific services.

A contracting authority is entitled to purchase directly products or services with an estimated value (excluding VAT) of RON 132,519 (approximately €33,129), or works with an estimated value (excluding VAT) of RON 441,730 (approximately €110,432).

The existing procurement methods are: open tender procedure, restricted tender procedure, competitive dialogue, negotiated procedure without prior publication, design contest, simplified procedure, competitive procedure with negotiation, innovation partnership, awarding procedure for social services and other specific services.

Prior to launching a procurement procedure, contracting authorities may conduct market consultations for preparing the procurement and in this context they may involve independent experts, public authorities or commercial entities, including representative organizations thereof. The advice received may be used in the planning and conduct of the procurement procedure, provided that it does not distort competition and/or results in violation of the principles of non-discrimination and transparency.

To simplify the procedure, the contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated sworn statement of the tenderer/candidate, as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfills the qualification conditions such as not being in the exclusion situations provided by law, meeting the capacity criteria and, as the case may be, meeting the selection criteria. Nevertheless, the contracting authority may ask tenderers/candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure. The tenderers/candidates are not obliged to provide such supporting documents if the authority has the possibility to obtain them directly by accessing a free national database.

*Last modified 20 Oct 2017*



## *What are the most common forms of funding / investing in energy and infrastructure?*

The principal forms of private sector funding/investment in energy and infrastructure in Romania (including in relation to public-private partnerships) are:

### **Funding**

Common forms of funding in energy and infrastructure include:

- loans made on a corporate-finance basis (balance sheet debt); and
- loans made on a project-finance basis.

Funding/funding products can also, sometimes, be provided by the European Bank for Reconstruction and Development.

### **Investing**

Common form of investing in energy and infrastructure is 'equity' investment in special purpose vehicles or entities that may have a portfolio of interests, ie share capital and subordinated sponsor loans.

*Last modified 20 Oct 2017*

## **Restructuring**

### **Enforcement and sanctions**

#### *When can there be regulatory investigations?*

The National Bank of Romania, in exercising its supervisory competences, is entitled by law to control and to check, on the basis of various reporting it receives and by investigations at the premises of the controlled entities, the accounts and any documents of the regulated entities that it authorized. Breaches of the applicable regulations may result in various measures and sanctions being applied by the National Bank of Romania, in accordance with the law.

As part of its supervisory competences, the Financial Supervisory Authority is entitled by law to perform on site verifications and, if the case, to order measures and impose sanctions.

*Last modified 20 Oct 2017*

#### *What regulatory penalties may apply?*

Depending on the breach, the National Bank of Romania may apply various sanctions, varying from written warning, public warning (in which the relevant guilty individual or entity, as well as the breach that has taken place are identified), fines applied to a legal entity (up to 10% of the aggregate net value of the turnover in the preceding financial year), fines applied to individuals (up to the RON equivalent of €5 million). Furthermore, the National Bank of Romania may also impose various measures aimed specifically at ending the observed breaches, such as withdrawal of the authorization granted to the credit institution. The National Bank of Romania makes public on its official website, the sanctions applied, in accordance with the law.

When a rule breach has taken place, the Financial Supervisory Authority (FSA) may issue a warning, impose a financial penalty, suspend or withdraw the authorization against the firm and/or regulated individuals. The FSA will publicize these penalties.

*Last modified 20 Oct 2017*

#### *What criminal penalties may apply?*

The breach of various legal provisions in the banking and financial investment services fields (such as performing credit activities or financial intermediation on a professional basis without being authorized) may constitute criminal offences punished with imprisonment or otherwise in accordance with the Romanian Criminal Code. The competent courts of law are involved in the actual application of the criminal sanctions.

*Last modified 20 Oct 2017*

## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### **Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?**

No stamp, registration, transfer or other similar taxes are payable on the advance, transfer or assignment of a loan.

#### **Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?**

In principle, no stamp, registration or similar charges are payable on the granting or registration of security, other than, *inter alia*:

- fees payable for the authentication by a notary public of an immovable property mortgage agreement (such fees are calculated by applying a certain percentage to the value of the secured amount and, therefore, can be significant);
- fees payable to the Electronic Archive of Movable Security (*Arhiva Electronica de Garantii Reale Mobiliare*) or any other relevant public registers for the registration of mortgage agreements; and
- fees payable for the registration of an immovable property mortgage agreement with the relevant land registry.

Depending on the nature of the assets over which security is taken, other forms of registration may also be required (or be advisable), which may also require the payment of fees. Similarly, various registration fees may be payable in the context of the transfer of registered security interests (made with a view to reflecting the change in secured creditor).

#### **Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?**

No stamp, registration, transfer or other similar taxes are payable on the issue, transfer or assignment of a debt security (eg a bond).

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#### *Do tax authorities take priority on enforcement?*

#### **On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?**

As a general rule, tax authorities take priority over other types of creditors in the case of enforcement of security interests. However, in situations where loans are secured over real estate properties or other assets and certain notification procedures have been complied with, secured creditors may take priority over the tax authorities on enforcement.

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#### *Is withholding tax on interest payments applicable?*

## Is there withholding tax on interest payments under a loan?

As a general rule, interest paid by a Romanian resident to a beneficiary who is not a Romanian resident, is subject to withholding tax.

**If so:**

### What is the rate of withholding?

The current rate of Romanian withholding tax is 16%.

### What are the key exemptions?

There are specific exemptions from the application of withholding tax for the following types of interest payments:

- interest related to public debt instruments, in Romanian and foreign currency, as well as interest related to instruments issued by the National Bank of Romania for the purpose of achieving the objectives of monetary policies and revenues derived from trading of titles issued by the National Bank of Romania;
- interest related to instruments/titles issued by certain Romanian companies, if such instruments/titles are issued based on a prospectus approved by the relevant regulatory authority and the interest is paid to a person that is not an affiliated person of the issuer;
- interest paid to a related party resident in a member state of the EU, provided that the conditions of the EU Interest and Royalty Directive, as implemented in Romanian domestic legislation, are met; and
- interest paid to certain pension funds, provided that between Romania and the country of residence of the income beneficiaries there is a legal instrument based on which information exchange can be performed.

A reduction or elimination of applicable withholding tax may also be available under the provisions of a double tax treaty concluded between Romania and the country of residence of the recipient/beneficiary, provided that certain requirements are met.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes, both withholding taxes and the applicable exemptions (if the debt security can be classified within the exemptions) are applicable.

*Last modified 20 Oct 2017*

## *Are foreign lenders and debt security holders subject to tax on interest payments?*

**Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding tax (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?**

No.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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