Legal considerations for foreign investors

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Foreign investors coming to Romania would be well advised, before starting their business, to inform themselves about every available option to set up and carry out their activities in a profitable manner that corresponds to their business profile and investment plans. This overview provides basic information about the legal requirements for a foreign investor in Romania.

Choosing a form of company

For a foreign investor coming to Romania to set up business, choosing a form of company, as provided by Romanian legislation, represents the first step of the investment. The most frequently used forms of companies are:

a. Limited liability company (SRL) – the shareholders' liability is limited to the amount subscribed as participation to the company's share capital. The share capital of an SRL must be at least LEI 200, app. EUR 65 (calculated at the EUR/LEI exchange rate of EUR 1/LEI 3.1), divided into shares with a par value of at least LEI 10 each. An SRL may be formed by a minimum of one shareholder and a maximum of 50 (fifty). These shareholders may include individuals and/or legal entities. A person, either natural or legal, cannot be the sole shareholder of more than one SRL. If a person intends to form several companies, it would be necessary for a minimum of one share to be held by another person or entity. Moreover, an SRL cannot have, as sole shareholder, another limited liability company that is also owned by a single shareholder.

b. Joint-stock company (SA) – the shareholders' liability is limited to the amount subscribed in the company's share capital. Further to the amendments introduced by Law 411/2006 to the Romanian Companies Law, the minimum statutory capital for a joint-stock company shall be LEI 90,000, app. EUR 29,000 (calculated at the LEI/EUR exchange rate of EUR 1/LEI 3.1). Shares must be held by a minimum of 2 (two) shareholders, individuals and/or legal entities (there is no maximum limit), and can be open to either public or private participation. The par value of 1 (one) share shall not be less than LEI 0.10.

Pursuant to the recent amendments, the shareholders may empower the administrators to increase the share capital of the company with a specified amount (the Authorised Capital). Such Authorised Capital may not exceed half of the value of the share capital.

For the administration of joint-stock companies two alternative systems may be elected: the unitary and the dualist system.

1. The unitary system - the company shall be managed by one or several administrators, organised as a Board. The Board can assign the management of the company to one or several directors. For those companies whose financial statements are subject to auditing such assignment is compulsory.
2. The dualist (two-tier) system – the management of the company is ensured by a Directorate and a Supervisory Board :
   - The Directorate carries out exclusively the activity and management of the company and reports to the Supervisory Board;
   - The Supervisory Board exerts permanent control over the Directorate of the company and reports to the General Meeting of the Shareholders.

According to the latest amendments, the administrators, the members of the Directorate or of the Supervisory Board may not conclude a labour agreement with the company. A services provision agreement (management agreement) is required instead.

c. Representative office – usually set up by foreign companies in Romania to carry out non-commercial activities such as advertising and market research on behalf of the parent company. Representative offices cannot conduct commercial activities in Romania. In order to register a representative office, company officials should apply to the General Department of Commercial Policies in the Ministry of Economy and Trade and pay an annual fee of USD 1,200 for the license.

d. Branch of foreign company – does not have its own legal personality or share capital. Being a unit of the parent company, branch activities cannot exceed the scope of activity of the parent company.

e. Consortium – domestic legislation allows for the conclusion of a joint venture agreement (*contract de asociere in participatiune*). Under this agreement, parties act together for the accomplishment of a common business goal. This form of doing business in Romania does not create a legal entity. Generally, one party is in charge of the bookkeeping of the joint venture.

Limited liability companies are the most popular vehicles among local and foreign investors for carrying out business activities in Romania because they have fewer administrative requirements and greater flexibility in operations than other types of companies. They also have a low initial capital requirement. However, the number of joint-stock companies in Romania is increasing because of their attractiveness to investors interested in equity investing. An SA must be set up whenever:

a. the company wants to carry out certain types of activities (e.g. insurance, banking activities, etc.);
b. the entrepreneurs foresee any advantage or necessity with respect to the acquisition of its own shares by the company (for instance, offering them to the managers);
c. the entrepreneurs plan to list the company on a stock exchange or on the OTC market;
d. the entrepreneurs contemplate financing the company through issue of bonds or other financial instruments;
e. the entrepreneurs intend to allow receivables towards third parties to be subscribed as participation in the company.

The other forms of doing business are not common among foreign investors in Romania. However, foreign investors still use representative offices if their activity involves only promoting one of their group companies in Romania. Branches are mainly used in cases where foreign investors plan for a short presence in Romania or if the investors decide, for capitalization (in the case of banks) or commercial reasons, not to legally separate the Romanian entity from the parent company.

Mergers and acquisitions

After completing the first investment stage – establishing a Romanian legal entity – foreign investors may, during the course of business, restructure their activities through mergers and acquisitions as stipulated by Romanian law.

Law 31/1990 (the Romanian Company Law), as amended by the Law 411/2006, and the methodological norms approved under Order 1376/2004 (regarding accounting procedures for mergers, spin-offs, dissolution, liquidation of companies, withdrawal and exclusion of shareholders, as well as the fiscal regime of such operations) represent the general legal framework for mergers and acquisitions in Romania. The Romanian Companies Law regulates both merger by absorption (whereby one or more existing companies are absorbed by another existing company) and merger by fusion (whereby a new company is created by integrating two or more existing companies), as well as spin-offs. The merger/spin-off should be decided separately, by each participating company voting in the General Meeting of Shareholders. Following this, a merger/spin-off plan is prepared and registered with the Trade Registry in order to be examined by an expert and to get the approval of the delegated judge and published in the Official Gazette.

Regarding the completion of the merger/spin-off operation two situations may arise:
a. where pursuant to the merger/spin-off new companies resulted, the operation takes effect upon the incorporation date of the new company or the last of the new companies.
b. for the other cases (e.g. merger by absorption, spin-offs where the transfer is made to already existing companies), the operation takes effect on the date when the resolution of the last company approving the operation is registered with the Trade Registry, save where the participating companies jointly agree on a different date. However, such date cannot be prior to the end of the last budgetary year of the company/companies that transfer its/their assets and

liabilities and cannot be later than the end of the current budgetary year of the absorbing or the beneficiary companies.

With regard to acquisitions, Company Law regulates the acquisition of shares in a limited liability company or in a joint-stock company. The acquisition's procedures are different as shares in a limited liability company are not freely transferable to third parties (a special quorum and a majority in the General Meeting of Shareholders are required), while shares in a joint-stock company are not subject to specific restrictions regarding their transferability to third parties, if not otherwise provided for.

There are also some instances where companies involved in a merger or acquisition are subject to certain competition regulations. However, as a general rule there are no competition issues to be considered when companies participating in a merger and/or acquisition are part of the same group of companies. Mergers and acquisitions involving at least one public company must be done in accordance with Capital Market Law 297/2004 and by observing the regulations issued by the National Securities and Exchange Commission (CNVM).

Real Estate

Pursuant to Romania's joining the EU, as of 1 January 2007, foreign investors interested in real estate acquisitions should note that EU nationals and entities, as well as stateless persons domiciled in any EU state, can acquire land in Romania, under the same conditions as Romanians, provided they reside in Romania. The above terms do not apply to buildings, which may be owned by any individual or legal entity irrespective of nationality or residence status in Romania (such individual or entity will not, however, own the land on which the building is situated).

Moreover, Law 312/2005, which regulates the conditions under which EU citizens and entities, stateless persons and other foreigners may acquire land in Romania, provides that EU persons that do not reside in Romania may acquire land here only after the expiration of a 5-year period after Romania's accession to EU.

With respect to agricultural and forest land, there is a 7-year freeze during which no EU national (save for Romanians) or other foreigner may acquire such type of land. However, farmers carrying out independent activities and who are: (i) citizens of member states or stateless persons domiciled in a EU member state, who have established their residence in Romania, or (ii) stateless persons domiciled in Romania - may acquire agricultural and forest land under the same conditions as any Romanian citizen commencing with 1 January 2007, without the possibility for such persons to change the specific purpose of such land.

For foreign citizens, stateless persons and legal entities from non-EU states, ownership over land may be acquired in accordance with the provisions of international treaties, based on reciprocity terms.

Investment incentives

Foreign and domestic investors are offered equal opportunities to invest in Romania. In general, incentives are intended to boost economic development of the country, particularly the acceleration of industrialisation in underprivileged zones, as well as the development of small and medium enterprises (SMEs), oil and gas sectors and micro enterprises.

However, a foreign investor should be careful when planning business on the basis of the current incentives granted by Romanian legislation due to the frequent amendment of laws in this field during the recent past.

Large investments with significant impact on the economy

Law 332/2001 provides incentives for direct investment in the equity of a Romanian company exceeding USD 1 million (or the equivalent in LEI or other convertible currencies) and which contribute to the development and modernization of Romania's infrastructure, creating new employment.

Under Law 332/2001, no customs duties are imposed on "new goods" (e.g. technology and automation equipment, installations, measuring and control devices, software products, etc.). In order to benefit from this incentive, these assets have to meet two requirements: (i) must have been manufactured a maximum one year before entry into Romania, and (ii) must not have been used before.

Small and medium enterprises

Law 346/2004 provides incentives for private investors who set up or run small and medium enterprises (SME).

Domestic legislation defines an SME as a company that (i) has an annual average number of employees below 250 and (ii) whose net annual turnover does not exceed EUR 50 million, or whose value of the total held assets does not exceed EUR 43 million, according to the latest approved financial statements.

Banking companies, insurance and reinsurance companies, companies managing investment funds, financial investments companies (i.e. security trading companies) and companies which have foreign trade as sole object of activity, cannot qualify as SMEs.

Romanian legislation provides for certain financing incentives to SMEs such as state assistance and loans guaranteed by the state.

Micro enterprises

The Fiscal Code establishes the taxation regime for micro enterprises. To qualify for this regime, the following conditions should be met by Romanian legal entities by 31 December of the previous year:

- over 50% of the total revenues obtained derive from other activities than consulting and management services;
- they have at least 1 (one) employee but not more than 9 (nine);
- their annual turnover does not exceed the equivalent to LEI of EUR 100,000; and

- the share capital of the micro enterprise is owned by natural persons or legal entities, other than the state, or local authorities and public institutions.

Micro enterprises are required to pay 2 % tax on any income, except certain items of revenue specifically provided (e.g. income from stock variations, income from provisions, etc.). The tax is paid quarterly, by the 25th of the first month following the reporting quarter.

Companies complying with the above conditions and taxed under the general profits tax legislation may opt for the 2% tax regime for the year 2007. In such cases, companies should submit a declaration exercising their option by 31 January. Newly set-up companies may indicate their option with respect to the applicable tax regime within the registration application lodged with the Trade Registry.

Preferential economic zones

According to Government Emergency Ordinance 24/1998 for setting up preferential economic zones in underprivileged areas, as further amended, these zones may be determined by Government Decision for a period of at least three years, but no more than 10 years. Law 507/2004 abolished the provision granting the possibility of extending the 10-year period.

Currently, there are 28 underprivileged zones in Romania located mostly in the mining centers of the country.

Investments in preferential economic zones benefit from tax exemption for profits on new investments, for the period during which the preferential economic zone status exists and only for legal entities that obtained the permanent certificate of investor in preferential economic zones before 1 July 2003.

The incentives granted under this law are subject to the limitations imposed by state aid regulations.

Industrial parks

Industrial parks, regulated by Government Ordinance 65/2001, as further amended, are considered strictly delimited areas where economic, research and technological development activities are performed. An industrial park may be set up only by a joint venture (*asociere in participatiune*) between the public authorities, legal entities, research and development institutions and/or other interested partners, as applicable. The industrial park must be managed by a Romanian company established in accordance with the Company Law, and whose shareholders can be the above-mentioned members of the partnership.

The incentives granted to industrial parks have undergone cancellations and/or amendments during the recent past, and more recently through the Fiscal Code.
The following incentives currently apply to the establishment and development of an industrial park:

- exemption from taxes due on conversion of agricultural land to be used for industrial parks;
- decrease of taxes related to buildings, constructions and land located inside industrial parks;

- other incentives which may be granted in compliance with the law by the local administration.

Free trade zones

Law 84/1992, as further amended, regulates the free trade zones regime.

Free trade zones are characterized by a specific customs regime: the customs supervision is limited to the borders of such areas.

Means of transport, products and other goods are admitted into the free trade zones regardless of their country of origin or destination. However, import of goods subject to prohibition under domestic law or under international agreements to which Romania is a party, is forbidden.

Mineral resources

Romania is rich in natural resources, especially oil, gas, salt, gold and silver ore and non-ferrous metals. Recent geological and geophysical studies have shown there are many mineral deposits (gold, silver, lead, zinc, copper, iron and manganese) and oil reserves (both on land and offshore) with considerable potential for exploitation. These offer substantial opportunities for foreign investors interested in these sectors.

Mining Law 85/2003, as further amended, regulates mining activities in Romania. Its defined scope is to ensure maximum transparency in mining activities and fair competition without discrimination between operators, depending on the property type and the origin of the capital.

Subterranean and aboveground mineral resources located within Romanian territory, within the continental shelf and in Romania's Black Sea economic area are part of the state's public property.

Mining is carried out through a mining license granted by the National Agency for Mineral Resources for a maximum period of 20 years, and the right to extend it for successive five-year periods in exchange for an annual mining royalty and surface tax.

Each mining license is established by Government Decision, and its provisions will remain valid throughout the license period, except when possible legal dispositions favorable to the license-holder might come into effect.

Foreign operators should set up a permanent subsidiary in Romania within 90 days of obtaining the mining license to be maintained throughout the period of operation.

Petroleum Law

Petroleum Law 134/1995, regulating all operations involving oil and gas reserves within Romania, was abolished and replaced by Law 238/2004.

Oil resources located on Romanian territory are exclusive public property of the Romanian state.

The Romanian state's interests in the mineral oil sector are represented by the National Agency for Mineral Resources. Through its representative authority, the state can grant a Romanian or foreign legal entity the right and the obligation to perform oil operations, based on an oil concession. The concession period may not exceed 30 years, with the possibility to extend said period with up to 15 years.

The oil operations can be conducted through exploitation licenses or exploration permits only within some perimeters, as delimited by the NAMR. Titleholders of an oil license are liable to pay a petroleum royalty in accordance with the provisions of Petroleum Law 238/2004.

Foreign operators should create a permanent establishment in Romania (i.e. a branch or company) within 90 days of obtaining the oil and gas license to be maintained throughout the period of activity.

Unlike Law 134/1995, Law 238/2004 does not grant any incentives to the holders of an oil license.

Tax litigation

When doing business in Romania, investors may not only encounter investment incentives but also the disadvantages of tax payments and tax inspections.

With a view to harmonizing legislation in the field, a Fiscal Procedure Code (further to the Fiscal Code) was enacted in December 2003 through Government Ordinance 92/2003 and has been subsequently amended several times. The Fiscal Procedure Code regulates, among other matters, the procedures for appealing against the action of the fiscal authorities.

Such contestations may refer to the reduction and/or cancellation – depending on the case – not only of taxes, dues, customs debts, contributions to special funds, late payment increases, penalties, or other amounts recorded and imposed, but of any other actions of the fiscal authorities.

The appeal must be filed with the fiscal authority issuing the respective action within 30 days from its communication to the petitioner.

The competent fiscal authority rules over the appeal by issuing a decision. The decision has to be communicated to the petitioner through the means specified by the Fiscal Procedure Code.

The petitioner may appeal such decision in the relevant court of law while observing all legal terms and formalities. After this, the judgment can be appealed at the superior law court.

Another important aspect related to such a dispute is that beginning an appeal does not suspend the execution of the contested action issued by the fiscal authorities. Therefore, a separate appeal to suspend the execution of the action should be filed with the competent fiscal authority, which may suspend the execution on condition that the petitioner provides valid reasons.