

Structural alternatives for public takeover offers

Aneta Maria Moldovan and Albert Birkner of Cerha Hempel Spiegelfeld Hlawati outline the takeover options available in Romania

The acquisition of a controlling interest in a Romanian publicly listed stock corporation (target) triggers the acquirer's duty to make a public takeover offer to all shareholders of the target. Depending on the structure of the acquisition, Romanian capital markets law contains several options for a public takeover offer. Public offers made before the acquisition of a controlling interest follow the rules for voluntary public takeover offers (voluntary offer), while public offers made after the acquisition of a controlling interest follow the rules for mandatory public takeover offers (mandatory offer). A public takeover offer is binding from the moment it is published and needs to be fulfilled according to the conditions provided by the law. Public takeover offers can be made under conditions other than provided for by law, such as merger control clearance, in particular under the condition of a certain acceptance level by the shareholders of the target. Such conditions, however, have to be fulfilled within a specific timeframe set out by the Romanian National Securities Commission (CNVM).

Public takeover offers

A public takeover offer is an offer to acquire securities, which is made to all shareholders and is circulated through mass media. An equal opportunity for acceptance must be given to all shareholders. The offeror will draw up an offer document to be approved by CNVM within 10 working days after the application is registered. A public takeover offer that does not have an approved offer document or does not comply with conditions established in the approval decision is null and void and entails penalties provided by the law. The advertisement for the public takeover offer

must be published in at least two national circulation newspapers after the approval by CNVM. On the publication of the ad, the offer becomes mandatory. Mandatory and voluntary takeover offers are made through an intermediary, who fulfils all formalities requested by the law, being authorized by CNVM to provide financial investment services. The price offered is established in accordance with CNVM rules.

Mandatory public takeover offer

Controlling interest

Pursuant to Romanian capital markets law, the acquirer of more than 33% of the voting rights of a company must launch a public takeover offer to all shareholders, the object being to acquire all their securities as soon as possible, and no later than two months after acquiring the securities.

Until the mandatory public takeover offer is launched, rights related to securities accounting for

more than 33% of the voting rights are suspended and the shareholder can no longer acquire securities of the same issuer through other operations.

Exceptions

The Romanian capital markets law provides exceptions from the requirement to launch a mandatory public takeover offer if a controlling interest of more than 33% of the voting rights is acquired:

- within the privatization process;
- by acquiring securities of the Ministry of Public Finance or other duly authorized entities, within the execution of budgetary claims;
- after the transfer of securities between the parent company and its subsidiaries or between the subsidiaries

- of the same parent company; and
- after a voluntary public takeover offer made to all shareholders and aimed at acquiring all their securities.

If a controlling interest of more than 33% of the voting rights over the issuer is acquired unintentionally, the holder of that controlling interest can, within three months from time the controlling interest is acquired, either:

- launch a mandatory public takeover offer; or
- transfer the property rights of a number of securities, to lose such controlling interest.

Price offer

The price of a mandatory offer will be at least equal to the highest price paid to the offeror during the 12 months before the offer.

If this is not possible, the offer price has to be determined in accordance with CNVM rules, by taking into account at least the following criteria:

- the average listing price related to the twelve months before the offer;
- the net asset value of the company based on the latest audited financial statement;
- the value of securities resulting from an audit performed by an independent auditor in accordance with international auditing standards (IFRS and IAS).

Timeframe

The mandatory offer has to be made within two months after the acquisition of the controlling interest in the target.

Voluntary public takeover offer

A voluntary public takeover offer is the offer made to all shareholders for all their securities and is launched by a person that is not obliged to do so because they do not intend to acquire more than 33% of the voting rights.

Controlling interest as a result

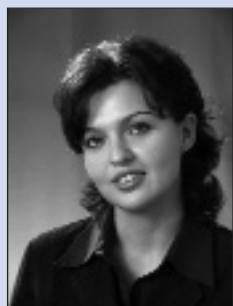
Public takeover offers therefore qualify as voluntary offers if the acquirer at the time making the voluntary offer does not hold more than 33% of the voting rights in the target but, due to a full acceptance of the offer, could result in acquiring such controlling interest.

Limitations regarding the activity of the target

The administrative board of the company that is subject to takeover has to issue a

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Author biographies

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Aneta Maria Moldovan, member of the Bucharest Bar, is an associate attorney-at-law and member of the corporate team at CHSH, Gilescu & Partenerii Cerha Hempel Spiegelfeld Hlawati. CHSH Gilescu & Partenerii has developed a particular reputation for establishing and representing further interests of commercial

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Albert Birkner is a partner and member of the banking and corporate finance team at CHSH, Cerha Hempel Spiegelfeld Hlawati, one of the largest Austrian law firms. Founded in 1921, CHSH has developed a particular reputation for representing industrial and commercial enterprises. CHSH is the Austrian member firm of Lex Mundi, the world's leading association of

independent law firms. The firm is proud of its strong banking and corporate finance department, which focuses on capital markets, banking, tax and M&A. CHSH is acknowledged as one of the top-tier firms in Austria. CHSH was awarded the IFLR Austrian Law Firm of the Years 2004 and 2005.

Albert Birkner is the chairman of the M&A practice group of CHSH. He has been with the firm since 1995. His main areas of practice are mergers and acquisitions, in particular takeovers, private equity and corporate restructurings. Albert Birkner has represented numerous national and international clients in takeover proceedings and matters generally relating to M&A and takeover issues before the Austrian Takeover Panel. He regularly advises on venture capital transactions and company law issues, in particular transaction-related restructuring.

Albert Birkner graduated from University of Vienna (Mag iur 1992, Dr iur 1995) and from University of Cambridge (LLM 1995). He worked as an academic assistant at the University of Vienna, Institute for Tax Law (1991/1992). Albert Birkner is the author of numerous publications in Austrian and international law journals in his areas of expertise. He also is an author and co-editor of a standard publication on commercial precedents under Austrian law and author of the *Austrian Corporate Governance Handbook*. Albert Birkner is a university lecturer.

statement on the takeover offer to CNVM, the offeror and the regulated market on which the securities are listed, within five days after receipt of the preliminary ad for the takeover offer. From the receipt of the preliminary ad to the closing of the takeover offer, the target's administrative board must inform CNVM and the regulated market of all operations performed by the members of the administrative board and the

management with regard to those securities.

After receipt of the preliminary statement and except for current administration acts, the administrative board of the target cannot make any act or to take any measure adversely affecting the assets or the objectives of the takeover offer. Assets are affected by certain operations, including but not limited to, capital increase, the issue of securities

giving right to subscription or conversion into shares, or encumbering or transferring assets representing at least one-third of the net assets according to the latest annual balance sheet (prohibition of *frustrating action*).

Operations derived from obligations assumed before the publication of the takeover ad, as well as the operations expressly approved by an extraordinary general meeting of shareholders specially convened after the preliminary statement, can be performed.

Romanian law does not prohibit expressly the possibility to issue a pure takeover offer for less than 33% of the voting rights in a listed company.

Timeframe

The publication of the preliminary statement binds the offeror to submit, within 30 days, the documentation related to the public takeover offer to CNVM, in terms no less favourable than those provided in the preliminary statement.

Competitive public offers

Any person can launch a competing offer for the same securities in the following conditions:

- the offer is for at least the same number of securities or aims at acquiring the same controlling interest in the share capital of the same target;
- the offer price is at least 5% higher than the previous offer.

The competing offer has to be submitted to CNVM no later than 10 working days after the date on which the first offer was made public.

Conditions, squeeze-out, de-listing

Romanian law does not provide for specific rules for a squeeze-out of minority shareholders. So the squeeze-out has to be structured as a reorganization of the target by means of a disproportionate merger or a disproportionate spin-off. Both the merger and the spin-off require a high majority of the votes in the shareholders meeting according to the provisions of the company's by-laws.

However, Romanian capital markets law provides that, if a shareholder holds more than 95% of the share capital or has acquired at least 90% of securities after a takeover offer, it may request, but not oblige, the other shareholders to sell their shares for a fair price.

The Romanian Law provides conditions for a stock corporation to be

publicly listed, such as:

- it is established and exercises its activities in accordance with legal provisions in force;
- the share capital amounts to at least €1 million (the equivalent in Romania new lei) calculated on the basis of the exchange rate communicated by the National Bank of Romania on the date when the application for trading was submitted ;
- the company has effectively performed activity during the three years before the application, and prepared and communicated its financial statements (balance sheet) for the same period in full compliance with the applicable legal provisions.

Companies not complying with these conditions, however, can be accepted on the regulated market, with the approval of CNVM.

Further, Romanian law does not provide for a formal application for the de-listing of publicly listed companies. The CNVM may request the de-listing of securities, if the conditions required by law are not longer represented.

Period of acceptance

Conditions contained in the public takeover offer have to be fulfilled within the acceptance period settled by CNVM. If the conditions are not fulfilled within that period, the offer is deemed to have failed and the acquirer is barred from any further offers for one year.

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