

MANDATORY TAKEOVER BIDS ON ROMANIAN CAPITAL MARKET

Cristian GHEORGHE*

Abstract

The Romanian Capital Market Law (Law no 297/2004) lays down rules regarding public offers (to buy or sell) of securities admitted to trading on a regulated market. Such offers are not unknown in the general framework of companies' regulations, i.e. Company Law no 31/1990. Actually a public limited liability company (joint stock company) can use a public subscriptions (offering shares for sale) to raise the registered capital for incorporation of the company or to increase the company's share capital already established. But all such operations are voluntary decisions. The founders or the shareholders of the company are those who decide to launch a public subscriptions.

Capital Market Law comes with something new and at least peculiar at first sight: mandatory takeover bid, meaning a mandatory public offer made by an offeror to the holders of the securities of a company (offeree) to acquire all or some of those securities.

Can someone be forced to buy securities on the regulated market? The Capital Market Law responds affirmatively, but only if such takeover bid follows or has as its objective the acquisition of control of the offeree company in accordance with national law. The takeover bid remains under supervision and authorization of the national authority of the Capital Market (FSA – Financial Supervisory Authority).

Keywords: capital market, investments, public offers, mandatory takeover bid, securities.

1. Introduction.

A joint stock company can use a public subscriptions (offering shares for sale) to raise the registered capital for incorporation of the company or to increase the company's share capital already established. Offering shares in a public manner is a common commercial issue that usually requires the authorisation of the national Securities and Exchange Commission. Such commercial operations are always voluntary decisions of the company or shareholders' decisions. They decide to launch a public subscription in their conditions: quantity and price. A mandatory bid is not an option in common commercial framework.

Capital market environment has its own goals and principles. One of these principles states the shareholders' rights and investors' protection. Therefore it is necessary to protect the interests of holders of the securities of companies when those companies are the subject of changes of control - and their securities are admitted to trading on a regulated market.

European legislator chose to lay down certain rules relevant when control of listed companies has been acquired or has been changed. Such rules¹ target the protection of the holders of securities, in particular those with minority holdings.

In the main the European directive recommends obligation for the person who has acquired control in a company to launch an offer to all the holders of that

company's securities for all of their holdings². Much more: the offer should be fulfilled at an equitable price.

2. Premises and principles.

In certain conditions a shareholder of a company (offeror) should be required to make a bid addressed to all the holders of those securities for all their holdings at the equitable price. Such provisions denote an intervention in the free commercial market. Not only must launch the bid but the offeror must fulfil in full any cash consideration. He has to be prepared to buy all company's securities still outside of his holdings. Such "mandatory buy" is uncommon even for capital market and infringes the principle of freedom of trade.

We must observe de higher consideration paid for all holdings on capital market. All holders of the securities of an offeree company must be afforded equivalent treatment. As a result, if a person acquires control of a company, all the other holders of securities must be protected at the same level³.

An offeror seeking to buy a controlling interest in a target company (offeree) from a (controlling) stockholder or different stockholders will usually pay a higher price, a premium over the market price of the target shares. Therefore control premium is an amount that a buyer is prepared to pay (over the current market price of a listed company) in order to acquire a controlling stake in that company.

European approach on capital market requires an acquiror who purchases a controlling block of shares to offer to buy the remaining shares from the minority

* Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: profesordrept@gmail.com).

¹ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

² Ibidem, Art. 5.

³ Art. 1, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

stockholders. Such vision calls for equivalent treatment for all shareholders, which effectively requires the control premium to be shared among all stockholders, irrespective the fact they provide or not shares for building up the controlling position⁴.

The relevant conclusion in EU law system is that capital market needs increased protection for investors and in case of clash of principles as abovementioned the investors' protection should prevail.

3. Mandatory bids on Romanian Capital Market.

As expected, Romanian legislator followed European vision in takeover bids matter. The European Directive pointed that Member States should take the necessary steps to protect the holders of securities when control of their companies has been changed or acquired. Such protection is enforced by obliging the person who has acquired control of a company traded on a regulated market to launch an offer for all securities issued by offeree company held by other shareholders⁵.

A natural or legal person who, as a result of its purchases or of the persons acting in concert with such person, holds securities giving more than 33% of the voting rights in a company traded on a regulated market shall launch a public offer addressed to all holders of those securities for all their holdings at the earliest opportunity but no later than two months from reaching such holding position⁶.

Such offer shall comply with requirements laid down for any takeover bid. Therefore the offeror is required to draw up and make public a purchase offer document comprising the information necessary to enable the holders of the offeree company's securities to reach a documented decision on the offer.

The minimum contents of information⁷ which shall be included in the public purchase offer document is prescribed through FSA's regulations⁸.

Before the offer document is made public the offeror shall communicate it to the supervisory authority which shall decide on the approval of the public purchase offer document within ten days from the registration of the request⁹.

4. Equitable price.

The equal treatment of all shareholders in a takeover process and a real minority shareholders' protection are enforced by the European legislator by guaranteeing an equitable price for mandatory takeover bids. Such price is regarded to be the highest price paid for the same securities by the offeror (or by persons acting in concert with him) over a period of not less than six months and not more than twelve months before the bid (shall be determined by Member States)¹⁰.

Supervisory authority may adjust upwards or downwards the price approved in a takeover bid in certain circumstances such as:

1. the highest price was set by agreement between the purchaser and a seller,
2. the market prices of the securities have been manipulated,
3. market prices have been affected by exceptional occurrences¹¹.

In such cases certain criteria shall applied to determine equitable price, such as: the average market value over a particular period, the break-up value of the company or other objective valuation used in financial analysis¹².

These European principles regarding equitable price are implemented by the Romanian legislator in Romanian Capital Law.

The twelve months rule: The price of the mandatory takeover bid shall be at least equal to the highest price paid by the offeror (including the persons acting in concert with the offeror) over the twelve months period prior to the submission of the mandatory bid offer document to Financial Supervisory Authority¹³.

Increased accuracy for bid submitted in legal term: FSA, ex officio or further to a notification could determine, on grounded reasons, that the purchases of shares may have been manipulated or offeror (including the persons acting in concert with him) did not acquire shares of the offeree company over the twelve months period prior to the submission of the offer document to FSA.

In this case the price offered within the takeover bid shall be at least equal to the highest of the three values determined by an appraiser appointed by the offeror:

1. the weighted average trading price on regulated market related to the last twelve months prior to the

⁴ American model is different: e.g. Delaware Company Law, which is representative for American state law, does not impose such a requirement.

⁵ Art. 5 para (1), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

⁶ Law no. 297/2004, Art. 203 para (1).

⁷ Regulation no. 1/2006 on issuers of and operations with securities, in force as of 6 April 2006, Annexe no. 23 to the regulation, Minimum contents of the public purchase offering document.

⁸ FSA, Financial Supervisory Authority is the Romanian authority with full capacity on Romanian Capital Market.

⁹ Law no. 297/2004, Art. 194.

¹⁰ Art. 5 para (4), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

¹¹ Idem.

¹² Art. 5 para (4), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

¹³ Law no. 297/2004, Art. 204 para (1).

submission of the purchase offer document to FSA;

2. the value of the company's net assets divided by the number of total shares, according to the latest audited financial statements;
3. the value of the shares determined by an evaluator according to international evaluation standards¹⁴.

Increased accuracy for bid submitted after legal term has elapsed: The hypothesis is the same: FSA, ex officio or further to a notification could determine, on grounded reasons, that the purchases of shares may have been manipulated or offeror (including the persons acting in concert with him) did not acquire shares of the offeree company over the twelve months period prior to the submission – *after de legal term of two months has elapsed* - of the offer document to FSA.

In this case the price offered within the mandatory takeover bid shall be at least equal to the highest price determined by an appraiser appointed by the offeror:

1. the weighted average trading price on regulated market related to the last twelve months prior to the submission of the offer document to FSA;
2. the weighted average trading price related to the last twelve months prior to the date when the controlling position (33% of the voting rights) was reached;
3. the highest price paid by the offeror (including the persons acting in concert with him) in the last twelve months prior to the date when the controlling position (33% of the voting rights) was reached; iv) the value of the company's net assets divided by the number of total shares (according to the latest audited financial statements prior to the submission date of the offer document to FSA); v) the value of the company's net assets divided by the number of total shares (according to the latest audited financial statements prior to the date when the controlling position was reached);
4. the value of the shares determined by an evaluator according to international evaluation standards¹⁵.

These provisions reveal the endeavor of the Romanian legislator to lay down accurate methods to enforce an equitable price.

5. Romanian law exclusions.

Mandatory takeover bids regulations provide equivalent treatment for all holders of the securities of an offeree company. Such regulations are well intentioned and appealing but can be overwhelmed by exclusions.

Romanian Capital Market Law decided large scale exceptions from mandatory takeover bid rules.

Exempt transaction. The mandatory takeover bid shall not apply if the control over the issuer was acquired as a result of an exempt transaction. Under Romanian law exempted transactions include: i) control was acquired within the privatisation process; ii) control of the company was obtained by purchase of shares from the Ministry of Public Finance or from other entities legally authorised, within the budget claims collection procedure; iii) control obtained following the transfer of shares between the parent company and its branches or among the branches of the same parent company; iv) control resulting from a voluntary takeover bid addressed to all holders of the securities and for all their holdings¹⁶.

Unintentionally control. The mandatory takeover bids have a distinct regime in some cases defined by the Capital Market Law as unintentionally acquiring of control in a traded company: i) the reduction of the capital through the redemption by the company of its own shares, followed by their annulment; ii) as a result of the exercise of the pre-emptive right, subscription or conversion of the initially allotted rights, and conversion of preferred shares into common shares; ii) merger, division or succession.

In abovementioned cases the person reaching the ceiling (33% of the voting rights) shall have alternative obligations: to make a public purchase offer, subject to the conditions and at the price provided for mandatory bid or to sell a number of shares, in order to drop below the control position acquired without intention¹⁷.

Legal remedies. If the person who, as a result of his purchases (or of the persons acting in concert with him) holds more than 33% of the voting rights in a company traded on a regulated market fails to launch a public offer addressed to all holders of securities no later than two months from reaching such holding position, the voting rights related to the securities exceeding the ceiling (33%) are suspended and the person (or the persons acting in concert with him) may no longer purchase shares of the same issuer¹⁸.

In the case of exempted transaction such ban does not apply.

Unintentionally control engages an alternative obligation that shall be fulfilled within three months from acquiring such position: to launch a mandatory takeover bid at an equitable price or to sell shares up under the ceiling (33% of the voting rights).

6. Sell-out and squeeze-out.

Mandatory takeover bids can have two special consequences:

¹⁴ Ibidem, art. 204 para (3).

¹⁵ Law no. 297/2004, Art. 204 para (4).

¹⁶ Law no. 297/2004, Art. 205 para (1) and (2).

¹⁷ Law no. 297/2004, Art. 205 para (5).

¹⁸ Ibidem, Art. 203 para (1).

1. a minority shareholder shall have the right to request the offeror to purchase his shares at a fair price and
2. the offeror shall have the right to request the shareholders who did not subscribe within the offer to sell him such shares, at a fair price.

Sell-out procedure¹⁹. This procedure is a “legitimate” one. After the closing of the mandatory takeover bid, in some circumstances, the remaining shareholders receive the right to sell their holdings to the offeror in the same conditions. The procedure can be understood as a legal extension of the period of the offer. The circumstances are laid down by Romanian Capital Market Law referring to the closing of the bid: i) if the offeror holds shares representing at least 95% of the total number of shares of the share capital granting voting rights; ii) if the offeror purchased, within the public purchase offer addressed to all shareholders and for all their holdings, shares representing at least 90% of the total number of shares referred to in the offer. In these situations a minority shareholder shall have the right to request the offeror to purchase his shares at a fair price²⁰.

Squeeze-out procedure²¹. This procedure is more spectacular. In the same revealed conditions ((i) if the offeror holds shares representing at least 95% of the total number of shares of the share capital granting voting rights; ii) if the offeror purchased, within the public purchase offer addressed to all shareholders and for all their holdings, shares representing at least 90% of the total number of shares referred to in the offer) the

offeror shall have the right to request the shareholders who did not subscribe within the offer, to sell him such shares, at a fair price. It looks like a “forced” purchase, without shareholder’s consent²².

The issuing company shall withdraw from trading on the regulated market as a result of the completion of the procedure for exercising the squeeze-out right²³.

7. Conclusions.

Romanian Capital Market Law is an example of how declaration of principles may be compromised by the exceptions stated in it. Romanian companies whose shares were admitted to trading on a regulated market are overwhelmingly privatised companies. Initially such companies have been involved in a mass privatisation process resulting in free allocation of share to population and admitting to trading floor.

Subsequently these listed companies have been privatised through the privatisation agreement concluded between the State as controlling shareholder and strategic investors. As exempted transactions such situations were excluded from the mandatory takeover bid rules.

This course of events put the Romanian Capital Law in contradiction with European principles regarding takeover bids. The law fails to ensure an equivalent treatment for any securities holders and a sound level of minority protection.

References:

- St. D. Cârpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2016;
- St. D. Cârpenaru et al., *Legea societăților. Comentariu pe articole. Ed. 5*, Bucharest: C.H. Beck, 2014;
- I.L. Georgescu, *Drept comercial român*, Bucharest: All Beck, 2002;
- S. Angheni, *Drept comercial. Profesioniștii-comercianți*, Bucharest: CH Beck, 2013;
- Cristian Gheorghe, *Dreptul pietei de capital*, Bucharest: CH Beck, 2009;
- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Bucharest: All, 1996;
- N.K. Kubasek și a., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996;
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003;
- S. Van Raepenbusch, *Drept instituțional al Uniunii Europene*, Bucharest: Rosetti International, 2014;
- T. Prescure, N. Călin, D. Călin, *Legea pieței de capital, Comentarii și explicații*, Bucharest: C.H. Beck, 2008;
- L. Stanculescu, *Dreptul contractelor civile*, Bucharest: Hamangiu, 2017.

¹⁹ Art. 16 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

²⁰ Law no. 297/2004, Art. 206 para (3) and (4).

²¹ Art. 15, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

²² This situation was challenged in front of Romanian Constitutional Court for alleged property right infringement. The Court stated the legislator’s capacity to establish limits for the exercise of rights for certain purposes and rejects the motion. (Decision no. 515 of 29 May 2007 on unconstitutionality motion of Art. 206 Law no. 297/2004 regarding Capital Market, published in Official Gazette no 431 of 28.06.2007).

²³ Law no. 297/2004, Art. 206.