Financial Institutions and Lending in Romania

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by Deloitte/Reff&Associates

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Banking Activity

General legal framework

The Romanian banking sector is organized into a two tier system, with the National Bank acting as the independent central bank. The Romanian National Bank ("NBR") is set up as an independent public institution, subordinated to the Romanian Parliament, with a fundamental function of ensuring and maintaining price stability in Romania.

According to Law no. 312/2004 regarding National Bank's By-laws, the main attributes of the central bank include the issuance and implementation of monetary and exchange rate policies, authorization and prudential supervisions of credit institutions, issuing banknotes and coins as lawful payment instruments in Romania, setting-up and monitoring Romania's currency regime and administering Romania's international reserves.

Commercial banks are entities which conduct business transactions mainly in the area of financing, investment and payment operations. Currently, the minimum initial capital for setting up a bank is RON 37 million in accordance with NBR's Regulation no. 18/2006 (e.g. totaling the share capital along with the legal and statutory reserves of the bank).

Types of credit institutions

The following types of credit institutions are regulated under the current legal framework:

- Banks;
- Cooperative credit institutions;
- Issuers of electronic currency;
- Mortgage banks;
- Savings entities for housing department.

Activities performed by credit institutions

Credit institutions may perform, within the limits of their authorization, the following activities:

- attracting deposits and other reimbursable funds;
- granting loans;
- financial leasing operations;
- payment operations (subject to a separate authorization from NBR);
- issuing and managing payment instruments such as: credit cards, traveler's cheques, including the issuance of electronic currency;
- issuance of guarantees and the undertaking of commitments;
- transactions with monetary market instruments on their own account or for the benefit of their clients;
- financial investment services;

- consulting services in areas such as capital structure, business strategy, mergers and acquisitions etc.;
- administration of clients' portfolios and related consultancy;
- custody and administration services related to financial instruments;
- intermediation on the interbank market;
- performance of services related to the procurement of data and references in the crediting domain; other activities or services, limited to the financial domain, with the observance of the specific legal provisions which are regulating the respective activities, if the case.

Cross border direct lending

Credit institutions authorized and supervised in an EU Member State may perform lending activities in Romania by setting up branches or directly engaging in lending activities. Direct lending by a credit institution authorized and supervised in an EU Member State is performed further to a notification addressed to NBR by the supervisory authority in the respective Member State, containing the activities that the said credit institution intends to carry out in Romania.

Assignment of loan portfolios

The current legal framework provides that loan portfolios can be assigned only to credit and non banking financial institutions, except for the cases when such assignment is made with respect to credit classified under “loss” category or for the purpose of securitization. The assignment of loan portfolios is a complex operation, having several implications including, without limitation, publicity of the assignment, tax issues (VAT, withholding tax etc.), data protection, banking secrecy etc.

Capital Adequacy

In view of the alignment of Romanian banking system to the capital adequacy requirements set out at EU level, NBR has issued jointly with the National Securities Commission (the Romanian capital market regulator) Regulation no.22/27/2006 concerning the capital adequacy requirements for credit institutions and investment firms. The above mentioned regulation was issued for the implementation of the EU Directive no. 2006/49/EC on the capital adequacy of investment firms and credit institutions.

Prudential requirements

Banks must comply with the prudential requirements issued by NBR and referring, without limitation, to: liquidity risk, operations concluded by the banks with persons with which they are having special relations, outsourcing of the activities of credit institutions, assets quality, provisioning, the amendments operated at the level of the credit institution, in respect with the conditions based on which its authorization was issued.

Non – Banking Financial Institutions

Law no. 93/2009 (hereinafter "Law 93/2009") sets the main legal framework applicable to non banking financial institutions.

Law 93/2009 qualifies as non-banking financial institution (“NBFI”) any legal entity (other than a bank) that grants/undertakes/engages in any of the following:

- Consumer credits;
- Mortgage loans and other secured loans;
- Trade financing;
- Financial leasing;
- Factoring/discounting;
- Guaranty/surety activities;
- Any other crediting activities.

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NBR has been granted broad powers to regulate and monitor NBFIs. NBR decides who qualifies as a NBFI, and whether an activity falls within the scope of Law 93/2009. NBR keeps General and Special Registries of all active NBFIs. All NBFIs are subject to regulation and monitoring; however, those that qualify for Special Registry status are subject to closer scrutiny and monitoring, as well as mandatory prudential guidelines. NBR's powers include, but are not limited to formulating mandatory prudential guidelines for NBFIs, inspection and document procurement powers and sanctioning authority.

Law 93/2009 requires NBFIs to meet a number of structural and administrative requirements such as minimum share capital of € 200,000 (or € 3,000,000 in case NBFI is engaged in mortgage lending activities) and maintaining internal prudential rules.

Secured lending in Romania

Mortgages over real estate properties

Under Romanian law, a mortgage is established based on an agreement concluded between the parties in an authenticated (notarized) form. In order for the secured creditor's rights to be enforceable against third parties, the mortgage must be registered in the Land Registry. Except for the case of a mortgage established as security for a mortgage loan (granted by an authorized entity), the mortgage cannot be established on future property. In order for the mortgage agreement to be valid and enforceable certain elements are mandatory to be included in the agreement, such as the identification of the mortgaged property and the value of the secured amount. The mortgage agreement securing a loan granted by a credit institution or a NBFI is a writ of execution (no judgment necessary for the enforcement thereof).

Security interests over movable assets

The applicable legal provisions regarding the security interest over movable assets are contained in the Romanian Civil Code and Title VI of Law no.99/1999 (concerning certain measures for the acceleration of the economic reform). The main characteristics of the security interest, as provided under the current legal framework are:

- the security interest agreement must be executed in written form and must contain the amount secured. Unless the parties stipulate otherwise, the security interest agreement shall cover in its entirety the secured obligation (including any interest, expenses paid by the creditor during the enforcement procedures, etc);
- the agreement must contain a description of the assets over which the security interest is established (such description could be made object by object, in kind, or by the general formula "all the debtor's present and future movable assets");
- future assets and even universalities of assets may be subject to a security interest. The security interest over a future asset shall produce effects upon the date when the debtor becomes legal owner of such asset;
- the security interest agreement is a writ of execution (no judgment necessary for the enforcement thereof);
- any clause restricting the debtor's right to sell the assets subject to the security interest shall be considered null and void.

The law establishes a compulsory system for establishing priority among creditors in collateral. The first creditor who files a notice of the security interest with the Electronic Archive for Secured Transactions shall be the first entitled to receive first the proceeds from the sale of the collateral in case the borrower is in default. The law also provides that the priority ranking between secured creditors depends only on the time of filing the notice of the security interest in the Electronic Archive for Secured Transactions.

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Risks deriving from the insolvency of a debtor in a secured loan

The position of a secured creditor must be carefully considered in case of insolvency of its debtor. Specifically, under Romanian law, in case of insolvency procedure started with respect to a legal entity, any agreements entered into by the respective entity shall be under the scrutiny of the appointed liquidator, who shall have the capacity to ask the cancellation of the agreements concluded by the respective legal entity if fraudulent to its creditors.

During the course of the insolvency procedure, any action relating to the recovery of receivables against the insolvent company are suspended by law, including any actions pertaining to the enforcement of the collateral under a secured loan. In certain specific cases, the secured creditors have the possibility to challenge the respective suspension, however the judge dealing with the insolvency procedure shall decide, on a case by case basis, whether such request is admitted or not. In any event, the proceeds resulting from the sale of the collateral asset shall be applied against payment of the secured creditor's receivables, however, after payment of the procedural and liquidator expenses.

From this perspective, it is strongly recommendable that legal advice is sought before enforcement of the collateral is envisaged.

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