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Buying and Selling Real Estate in Romania

ILN REAL ESTATE GROUP

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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ROMANIAN LAW

I. Types of Real Property Transactions

A. Purchase of an undeveloped plot of land (agricultural);

B. Purchase of brownfield renewable power generation projects along with land rights for power generation installations, connection, and the collection network;

C. Secure land rights (ownership right, superficies right, concession right, use and easement rights) to enable the development and delivery of turnkey renewable power generation greenfield projects;

D. Purchase of a buildable plot of land (with or without a building);

E. Purchase of a building without the land (with superficies right over the land);

F. Purchase of a flat (condominium);

G. Purchase of a company having real estate assets.

II. Major Content of the Purchase Agreement

A. Main elements of the Purchase Agreement

The contract must include: the identities of the parties, description of the real estate (address, surface area, buildings, cadastral number and Land Book registry number), purchase price (which must be serious – not derisory, real – not fictitious, and determined or determinable), as well as the main obligations of the parties (i.e., to transfer the property rights and to pay the price).

The rest of the contractual provisions are, in principle, freely negotiated between the parties: conditions precedent, transfer date, risk allocation (with certain legal exceptions), guarantees, payment date, etc.

A separate note should be made in respect to purchase agreements for brownfield/greenfield renewable power generation projects, which usually include specific conditions precedent related to project permitting.

B. Specific conditions applicable to renewable generation projects

Permitting of a renewable project in Romania is split into several streams, sometimes interconnected: (i) civil construction permitting stream (covering also urban planning and environmental aspects), (ii) Sector-specific permitting stream.

The relevant authorities have already significant experience with the permitting process from the first generation of renewable projects. Difficulties may appear given that several pieces of legislation regulating land use and building permitting was amended in 2022 to make the permitting process for renewable energy projects easier by reducing land planning formalities and thus, project development time, so that different interpretations may be embraced by different stakeholders.

Thus, for renewable power generation projects (i.e., solar, wind, biomass, bioliquid and biogas projects) covering an area of up to 50 hectares, until 31st of December 2026, was eased the removal from agricultural purposes category.

Another amendment aiming to facilitate the development of renewable power generation projects was introduced by Law no. 159/2022, into Law no. 50/1991 on the authorization of construction works, to provide that building permits may be issued without land planning documentation for the production of electricity from renewable sources and hydrogen.

For the same purpose as above, a similar amendment has been brought by Law no. 166/2023 to the provisions of Law no. 350/2001 on regional planning and urbanism. Thus, the right to build will be granted, even in the absence of approved urban planning documents, for construction works of renewable sources electricity and hydrogen production and storage capacities, located either in urban or rural areas, including transforming capacities, cables and installations for their connection to the public utility grid.

Further coordination is necessary among Law 18/1991, Law 50/1991 and Law 350/2001 as recently amended, in order to clarify the uncertainties about the implementation of simplified urbanistic procedures.

III. Conclusion of the Purchase Agreement

Validity requirements on the form of the purchase agreement. All *in rem* rights over real estate (including ownership) must be transferred through authenticated agreements concluded before a Romanian public notary, under the sanction of absolute nullity of the agreement. The notary public may be chosen by either of the parties. An agreement relating to rights *in rem* over a real estate property located in Romania must be governed by Romanian law.

The persons who sign the agreement before the notary public must have proof of identity (ID Card, Passport, etc.) and, if the case may be, proof of power of attorney (which must also be authenticated by a notary public and must expressly give power to sell/purchase the specific property). If the buyer/seller is a legal entity, proof of status of the company must also be provided.

The notary shall verify the status of the property and shall obtain an authentication excerpt from the relevant Land Book which shall block any further registrations in the Land Book until the agreement is registered after signing. All the Land Book registrations/de-registrations in respect of the ownership title shall be carried out by the notary public.

The parties will sign only one copy of the agreement which remains in the public notary's archives. The notary shall provide as many duplicates as necessary, which shall be only signed by him/her.

It should be noted that in Romania there are certain pre-emption rights or other statutory (imposed by law) limitations potentially applicable in relation to some specific categories of real estate properties (outside city limits, agricultural). Examples include pre-emption rights of the State, of the tenants of agricultural land or public service providers (public schools, hospitals), neighbours, etc. Land near the borders may be sold only with the prior approval of the Ministry of Defence. The rules for the exercise of the pre-emption right have been changed (the amendment entered into force on 13 October 2020) and they have become more cumbersome. The

methodological norms for the implementation of the law are unclear, still raising many questions from the notaries who are supposed to authenticate sale purchase agreements (i.e., the first sale purchase agreements according to the new law were concluded starting in July 2021). Clarifications are being sought by notaries from the relevant ministries, which are expected either to clarify the norms by amending them or to provide to the notaries a manual of good practice.

IV. Transfer of Ownership

As a general rule, the property right transfers automatically upon the execution of the agreement, unless the parties have otherwise agreed (e.g., until fulfilment of conditions precedent).

The registration in the Land Book is made for opposability purposes only and is to be carried out by the public notary following the execution of the agreement.

Certain rules shall come into effect after the finalization of the cadastral works on all land in Romania. Specifically, once the entire cadastral works for all land in Romania are finalized (a date which is difficult to estimate at this stage), the registration of the property right transfers with the relevant Land Books shall no longer be performed for opposability purposes only but shall become constitutive of a right (i.e., the transfer will operate as of and on the basis of the registration with the relevant Land Book).

In relation to brownfield/greenfield renewable power generation projects, the project company must secure, already from the development phase, a title to land proper for building purposes, which would typically be ownership right or superficies right.

A legal difficulty may be encountered in rooftop solar projects (if the owner of the building is not the owner of the land as well) given that the legal definition of superficies relates to land.

V. Agents

Both parties may use a real estate agent. In general, the agents conclude mainly exclusivity agreements.

The general commission on the market today is approximately 1-3% (depending on the value of the transaction).

VI. Forms of Ownership

In general, Romanian and EU individuals/entities may own land in Romania. While there may be some restrictions for other foreigners to own land in Romania, the practice for foreign investors is to incorporate a Romanian legal entity which has no restriction on owning lands.

The "right of ownership" gives the owner the power to possess, use and dispose of the property.

A. Acquisitions

A real estate deal in Romania may be made either (i) by way of an asset deal (direct acquisition of an asset) or (ii) by way of a share deal (acquisition of the shares in the holding entity of the asset).

Share deals are often preferred to asset deals due to cost and tax optimization purposes, as they are not subject to the fees and costs entailed by an asset deal, as they do not entail the transfer of ownership of the real estate. However,

according to Law 175/2020 which entered into force on 13 October 2020, the company who owns, outside city limits, lands, and which sells enough shares to ensure control over the company, shall pay a tax of 80% applied to the positive difference between the value of the agricultural lands from the date of sale and that from the date of purchase, determined according to the indicative value established by the expertise made by the chamber of notaries public or to the minimum value established by the market study carried out by the chambers of notaries public, as the case may be, from the respective period.

This rule is also applicable if the sale of the control package takes place before the anniversary of 8 years since the acquisition of such lands and if such lands are more than 25% of the company's assets. This tax is an additional tax to the ones due in consideration of the Fiscal Code, moreover, this tax is not considered a deductible expense when calculating the tax on profit.

B. Residential Property

The most frequent forms of ownership of residential property are:

1. **Sole ownership**: The owner is the only person authorized to control and dispose of the land in question.
2. **Common ownership**: More than one owner over the property; there are two types:

   (a) joint ownership (ownership by two or more persons holding undivided – undetermined – shares over the property – such as ownership by spouses); no deed may be concluded without the consent of the other co-owner.

   (b) co-ownership (ownership by two or more persons holding determined shares over the property) which, in turn, can be ordinary co-ownership (e.g., two buyers acquire 50% each of a property) or forced co-ownership (e.g., forced co-ownership of the owners of apartments in a building over the common parts of a building – stairs, lobby, elevator, rooftop, etc.) – deeds may be concluded by each co-owner for its share of the property

C. Commercial Property

Owners of commercial property are most frequently legal entities. The most commonly used entities under Romanian law are joint-stock companies (SA) and limited liability companies (SRL).

i. Limited Liability Company – SRL

1. Legal Entity

SRLs are the most commonly used vehicles.

An SRL is managed by directors who act under the control of the general meeting of shareholders. Shareholders may also be appointed as directors.

No restrictions on citizenship or residency apply for directors or shareholders.

2. Formation

The main steps for the establishment of a SRL are:

a. Applying for and obtaining reservation of the SRL's trade name,

b. Choosing a Registered Office,

c. Drafting and submitting the SRL's constitutive documents to the Trade Registry, and

d. Subscribing the share capital.

A SRL may also be incorporated by a sole shareholder even if:

(i) this shareholder is sole shareholder in another company; or

(ii) the sole shareholder is a legal entity which, in turn, has a sole shareholder.

Timing: In principle, after all documentation is submitted, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry (if no other issues arise and no additional documents are requested).

3. Costs of Formation

The administrative fees are approximately RON 1,200 (approximately EUR 250).

4. Minimum Registered Capital

The minimum share capital is RON 1.

5. Limited Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.

ii. Romanian Joint-Stock Company – SA

1. Legal entity

The minimum number of shareholders of an SA is two.

An SA is more complex than an SRL. The supreme corporate body is still the general meeting of shareholders as in the case of an SRL.

The management of a joint-stock company is carried out:

(i) either by a director or a board of directors (one-tiered management) – the board of directors may delegate the management to one or more managers;

(ii) or by a supervisory board and a management board (two-tiered management).

The board of directors, as well as the supervisory board, must hold quarterly meetings.

2. Formation

The main steps of the establishment of a joint-stock company are:

a. Applying for and obtaining reservation of the joint-stock company's trade name,

b. Choosing a Registered Office,

c. Drafting and submitting the joint-stock company's constitutive documents to the Trade Registry, and

d. Subscribing the share capital.

Timing: Once all of the documentation is available, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry so long as no issues are identified, or additional documentation is required.

3. Minimum registered capital

The minimum share capital is RON 90,000 (approximately EUR 20,000).

4. Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.

VII. Financing

Financing is typically secured by way of bank loans. In most cases, banks will require securities (collateral) from the borrower.

Securities or collateral may consist of one or more of the following: mortgage of immovable assets (typically, but not necessarily the real estate which is bought with the loan); mortgage of movable assets (bank accounts, receivables, shares, cars, etc.), assignment of receivables for guarantee purposes or autonomous bank guarantees.

VIII. Payments and Costs. Taxes Involved in Real Estate Transactions

A. Asset deals: Related taxes

The following fees are due in an asset deal involving real estate:

(i) public notary fees for authenticating the SPA – up to 0.5% of the purchase price,

(ii) Land Book registration tax – 0.5% of the purchase price for legal entities and 0.15% for natural persons.

In practice, usually the purchaser bears all of the fees and taxes of the sale, but the parties may agree to split the costs between them. The seller usually pays the sale tax for sale of immovable property.

VAT shall apply to the purchase price if the land might be buildable (according to the urbanism certificate) or new buildings are being sold (or parts thereof). Standard VAT is 19% but there are special VAT percentages in some cases (e.g., starting on 1 January, 2023 – 5% for a natural-person buyer individually or together with other natural person of a property under Euro 120,000, and with a surface of a maximum 120 m^2, provided that the property is fully constructed – the buyer can immediately move in and only for the first acquisition). Nevertheless, if both the seller and the buyer are registered for VAT purposes, VAT is not effectively paid as the reverse charge mechanism is applied.

B. Share deals: Related taxes

If the shares are sold at their nominal value, no special taxes shall be imposed. However, if the shares are sold at a price higher than their nominal value, the seller shall pay profit/revenue taxes on the difference between the nominal value and the value of the transaction.

Also, certain fees must be paid to register the transfer of the shares with the Trade Registry (approximately EUR 200).

IX. Examinations Before Closing

The buyer should make the relevant examinations in order to determine any deficiencies in the property right or in the property itself.

Pursuant to Romanian law, a legal conclusion on whether there is a valid title to certain real estate may be given only after examination of the whole chain of transfers in respect of the particular real estate. There is no rule under Romanian law that the last registered owner of the real estate is its true owner/holder. The registered owner is only presumed to own a valid title until proven otherwise by an interested person. If any of the current owner's/holder's predecessors' rights over particular real estate suffer from any defect in title, such defect survives the subsequent right transfer and affects the right of the current owner/holder.

Thus, under Romanian law, if the ownership title over real estate is cancelled, all subsequent acts of the ownership transfers might also be cancelled by Romanian courts, at the request of interested persons.

Cancellation of the subsequent acts may be requested at any time, no statute of limitations is provided by Romanian law in such cases, in consideration of the fact that property right is guaranteed under the Romanian Constitution.

Nevertheless, according to the Land Book Law, if no deficiency arises from the analysis of the relevant Land Book, a third party may no longer be deregistered after three years from the moment the last owner was registered in the Land Book. This provision is applicable only if the third party is at least the third owner registered for that particular Land Book – i.e., if the Land Book is newly opened, this should not apply, and the third party may be deregistered at any time. Consequently, in practice, as the safeguarding of concluded transactions is preferred, it becomes more difficult to amend the content of the Land Book and implicitly, to challenge the ownership title once the aforementioned conditions are met.

The seller should disclose any relevant hidden defects in the property itself or in the property rights.

If the buyer intends to build on the land, verifications should be made in order to assess the existence of restrictions on building in that area (general, zonal, and detailed urbanism plans). Note that a permit is, in most cases, needed for building, as well as for demolition.

Moreover, should building be envisaged on the acquired land, the buyer must take into account that, in order to obtain the building permit, several authorisations such as an urbanism certificate, environmental clearance or ISU approval certificate must be obtained from the relevant Romanian authorities.

In addition, according to Law no. 102/2023 on amending Law no. 50/1991 and Law no. 350/2001, the holder of the building permit must fulfil several publicity formalities, including, but not limited to the notification of the building permit in the Land Book and publishing the title of the investment objective and the number and date of the building permit in a widely circulated newspaper.

Furthermore, if the acquired land is agricultural, its type may be changed to buildable, in order to be able to actually build on it, by requesting modifications to the regional urbanism plans – if the land is outside the city limits. However, in consideration of Law 175/2020, which entered into force on 13 October 2020, this operation has to be carefully assessed as it might be extremely difficult to amend the regional urbanism plans and to move the land within city limits.

In light of the aforementioned, it is strongly recommended to undertake a due diligence investigation prior to proceeding with real estate investments in Romania.