

# Romanian Transactional Work Trends and Tips for 2023



Recent years have largely confirmed the market expectations for the transactional legal work to get lighter, faster and of course better in order to keep up with the economic structural transformations.

In terms of legal counsel work, the “lighter-faster-better” paradigm brought in massive changes in relation to the transactional due diligence scope and standard of review, project structuring, transaction documenting, and it has hallowed the legal risk hedging. I discuss below these trends and share certain tips.

## **Due Diligence Scope and Standard of Review**

The usual suspects around critical impact clearances have traditionally been assessing and handling the relation with the relevant regulators or control authorities, or more recently and acutely the Sanctions impact. Beyond them, checking the mechanism for analysing and authorising foreign investments from outside of the EU space has become of ever-increasing importance. Together therewith, and of course related thereto, the assessment of conducting business bans and restrictions, as for example limitations of rights to partner or bid, limitations of capital expenditures or investment, including profit repatriations, are getting a central role in the diligence review. The same is applicable in case of the risk of state intervention by means of regulation or administrative actions, or by indirect competition more generally.

Careful review of change of control provisions of all nature, scale and effect, and at all levels, remains a key concern, including with respect to the risk to trigger a hostile action or a take-over or a mandatory procedure of any kind as a result of the prospected transaction. Nonetheless, at the same time the compliance package – “The ABC Review” – and the reputational assessment, including issues in the public-private relation, got equally important. Same goes with what I refer to as “The Triple K Analysis” or the KYP – KYS – KYC Assessment [know your partner, your supplier and your customer]. All these require an even more pervasive investigation when it comes to publicly funded contracts, joint venture

agreements and consortia or contractor or sub-contractor agreements in relation to public to private contracts, which will add a layer of complexity where there is 'PEP involvement'. Scrutiny of contractual arrangements where politically exposed persons are involved has always been a hot point in the DD, but the standard of review got elevated notably. As it is the case with the assessment of conflicts of interest.

I would add here three other major trends. One refers to rating the stability of the target core business from a legal standpoint, which entails the legal review of matters relevant for the target's supply chain security, but also for key customer retention or the labour and expert capital stability. With it, the retention rate and review of relations in view of contracting or restating contracts with senior management is also a must. A second one purports to a shift of focus in the analysis of project target indebtedness regime, a re-prioritizing of the assessment over the quality of the financing, the risk of cross default and the solidity of senior collateral securities regime. Open-ended arrangements with contingent liabilities, including partnerships, undertakings of loss compensation or gapping a guaranteed income, as well as previous mergers and acquisitions tail obligations, also represent a feature of the core business legal stability rating.

Thirdly, litigation due diligence turned more into assessing the dispute resolution conduct, resources and scoring of the target, based not only on the general dispute standing and representation, but also on the general performance of undertakings.

### Project Structuring

In transaction structuring, jurisdiction of the target company and of the purchaser were always the first to consider. We see now such considerations being formulated more frequently not only upon the acquisition, but in terms of return of investment. However, projects structuring got closer to the target jurisdiction and the core places of the business, and less to the corporate or management legal quarters.

More often, transactions are structured as asset deals, or asset-based deals, with various and more complex caveats indeed, or as transfer of business (as a going concern). The number of transactions structured as neat share deals is significantly decreasing.

Contract culture seems to have finally absorbed the predicament that the best protection one can get in a deal does not come from the contract language, but from transaction structuring and, notably, from the project processes, carefully designed to govern the investment relationships from the initial ice-breaker talks to the most remote post-acquisition covenant.

### Transaction Documenting

We are facing a new very complex evolution in the transaction legal documenting work, in itself a consequence of the shift in the due diligence scope and standard of review and originating in the structural transformations taking place in the economic sector. The 'lighter-faster-better' paradigm seems to generate in the transaction documenting domain some five major trends.

First, there is an advent of "umbrella agreements", definitely more often used nowadays than previously. Secondly, transaction mechanics see a certain preference for one-step completion structures, as opposed to two-step structures where signing and closing used to be detached. Thirdly, the architecture of conditions precedent is changing dramatically, as only fully objective, material CPs get their way through now, and mainly those related to regulators, clearances or certifications. Fourthly, a 'demise of the MAC clause' is taking place, with material adverse change and material adverse effect provisions being resisted more and more successfully on the sale or commitment side. Fifth, gun-jumping and conduct covenants contract menus are also notably reduced.

### Legal Risk Hedging

But, to end with, the most spectacular change of recent years which seems able to yield permanent effects consists in what I tag as the legal risk hedging. Against a background where the specific performance of the undertakings is favoured towards collection of liquidated damages, new tools for managing transaction failure or loss risks have been developed. The most popular so far include Transaction Risk Insurance, Representations, Warranties and Indemnity Insurance, but also various ADR Mechanisms, such as Expert Board Determinations, as well as third party driven work-out or compensation methods.



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