Netherlands Romanian Chamber of Commerce ("NRCC")

Position Paper on 30 Day Objection Period

The Netherlands Romanian Chamber of Commerce ("**NRCC**") is a non-profit and non-political organization that supports and promotes the Dutch-Romanian business community. NRCC creates business opportunities within its active community of members, having close contact with the Embassy of the Netherlands in Romania and acting as a consultation partner between the business sector and the Romanian Government.

This document sets out the position of NRCC with regards to Emergency Governance Ordinance 54/2010[1] ("**Ordinance 54"**) regarding measures for preventing tax evasion on the amendment of the Companies Law 31/1990[2] ("**Companies Law**").

In June 2010, the Romanian Government introduced new impediments to transferring ownership interests in a limited liability company. Specifically, creditors of the company, creditors of its shareholders and "*any other persons harmed*" may, within a 30-day term, object to a proposed transfer of ownership interests to a third party, and during that period – as well pending any objection – the transfer is suspended (the "**Suspension Period**").

The relevant provisions mentioned above read as follows:

Article 202:

*1) Shares[3] (*note: in a limited liability company*) may be transferred between shareholders.*

2) Transfer to parties outside the company is allowed only if approved by the shareholders representing at least three quarters of the share capital.

2^1) The shareholders' meeting resolution adopted under para. (2) shall be filed within 15 days with the trade registry office, to be mentioned in the register and published in the Official Gazette of Romania, Part IV.

2^2) The trade registry office shall immediately transmit, via electronic means, the resolution provided for under para. (2^1) to the National Agency for Fiscal Administration[4] and to the county and Bucharest general directorates of public finance.

2^3) Social creditors and any other person harmed by the shareholders' resolution concerning the transfer of shares may file an objection requesting the court to order the company or the shareholders, as the case may be, to remedy the damage caused and, if necessary, the civil liability engagement of the shareholder who intends to sell shares. The provisions of rt. 62 shall apply accordingly.

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[1] Published in the Official Gazette of Romania No. 421 from the 23rd of June 2010.

[2] Republished in the Official Gazette of Romania No. 1066 from the 17th of November 2004.

[3] Shares in a limited liability company, i.e. in Romanian, "*parti sociale*".

[4] In Romanian ANAF - Agenția Națională de Administrare Fiscală.

(2^4) The transfer of the shares will take effect, absent an objection, upon the lapse of the opposition term referred to in art. 62 and, if an objection was filed, on the communication date of the court's decision rejecting it. (…)

Article 62:

1) The objection is to be made within 30 days from the date of publication of the shareholders' resolution or of the modifying addendum in the Official Gazette of Romania, Part IV, if this law does not provide otherwise. It shall be filed with the trade registry office which, within 3 days from the date of submission, shall mention it in the register and forward it to the competent court. (…)

This position paper outlines NRCC's position regarding Ordinance 54, as well as the reasons why the Suspension Period should be repealed.

1. The Suspension Period appears to be unique to Romania

Firstly, we are not aware of a similar suspension period in the laws of another country. We therefore question why circumstances would be so unique to Romania that the Suspension Period would be needed, whereas elsewhere it is not. We believe that there are no such unique circumstances in Romania.

A possible reason for the change of law effectuated by Ordinance 54 may have been to put in place a mechanism akin to the ability of a court to unwind a transaction in the suspect period where a company is insolvent. Basically, Ordinance 54 could be seen as erecting a barrier to sale of any SRL unless the seller could prove that it does not have a liability (or perhaps even a contingent liability) to a third party. If this is the intent, then it marks a radical departure from accepted practice in modern industrialized nations, *because the result is that shareholders have been deprived of their freedom to dispose of assets unless they have paid their debts*.

At any rate, the nature of the prejudice that a creditor or "other person" might suffer is unclear. The company whose ownership interests are being transferred will continue to exist as a corporate entity, so there could be no prejudice arising by a mere change of owners. Further, there is a suspect period under insolvency law that could unwind the transaction – the standard manner in which courts in modern nations consider prejudice of creditors.

The jurisprudence has questioned the need for the Suspension Period.[5]

2. The Suspension Period harms Romania's efforts to create a business-friendly environment by creating wholly unnecessary delays and uncertainty in private commercial relationships.

The reality is that suspending the transfer of title while allowing third parties to object over a 30-day period creates uncertainty and delays in private business relationships, thereby adding one more element of weight against a decision to invest in Romania. This type of requirement is a classic example of the kind of red tape that deters foreign investment – not this single restriction by itself, surely, but in conjunction with a panoply of other requirements of law that seem to have little basis in precedent or indeed logic and provide few if any tangible benefits to anyone with legitimate interests.

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[5] L. Săuleanu, *Societăți Comerciale*; Gh. Piperea/P. Piperea, *Legea societăților – Comentariu pe articole*, pag 703 et. seq.

Complex, cross-border transactions involving multiple jurisdictions are especially damaged by the Suspension Period. This is because in such transactions, it is common that various acquisitions and financings must close simultaneously – or not at all. Thus, by leaving the door open for the Romania piece not to close or to be significantly delayed beyond a "drop dead date" agreed between a buyer and a seller, entire transactions are jeopardized.

In addition, the time to arrange publication of the shareholders' resolution (or the modifying addendum) in the Official Gazette of Romania takes on average 14 days and can take as long as 30 days. As a result, while the Suspension Period for creditors or other "interested persons" is 30 days, the *de facto* period for the parties involved in the transfer can reach even 60 days in some cases. As shown above, this has a significant negative impact on complex cross-border transactions.

3. The Suspension Period encourages extortion by third parties who use the threat of delay to exert pressure on companies to pay questionable claims.

The Suspension Period increases the leverage of third parties to demand payment of claims – <u>however dubious</u> – against the SRL or the transferring owner by threatening to object and to appeal until all recourse is exhausted. Unfortunately, we have seen many examples of delays of 6 or more months, as cases wind their way through the court system.

In addition, our members have been involved in cases where the fiscal authorities have objected in error or for *de minimis* sums, such as (literally) RON 10. Even if such minor amounts are paid to the fiscal authorities, or the error is acknowledged and the objection withdrawn, the delays and consequent costs are inevitable and can far exceed the amount of the claim.

The unfortunate truth is that the fiscal authorities often object due to claims against the target company. Given that the claim of the tax authorities is not in fact prejudiced by such a transfer (since, as noted above, the company whose ownership interests are being transferred will continue to exist as a corporate entity), we object to allowing a situation where the fiscal authorities can delay and possible derail a business transaction. It is worth noting that courts have agreed with our position[6], based exactly on that reasoning.

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In the context of the above, NRCC calls on the Government to repeal the Suspension Period as imposed by Ordinance 54, as this law has a distorting impact on the business environment, and its long-term effects are negative for the business climate at large.

[6] Decision no. 1519, dated 21.10.2011, Bucharest Court of Appeal; decision no. 1320, dated 7.12.2010, Craiova Court of Appeal.