
Romania

Treasury Shares Guide

IBA Corporate and M&A Law Committee 2012

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INTRODUCTION

The purpose of this guide is to provide you with insights on the Romanian law governing acquisition and sale of treasury shares of Romanian joint-stock corporations (*societati pe actiuni*), both listed and non-listed on a regulated market.

The information contained in this guide is succinct and of a general nature and is not meant as legal advice, or to substitute professional legal, fiscal or accounting advice.

GENERAL OVERVIEW

Is the buy-back of shares permitted in your jurisdiction?

Yes, the buy-back of shares is permitted subject to certain restrictions and limitations under the Romanian Company Law No 31/1990 (the 'Company Law').

In respect of buy-back of shares listed on a regulated market, the limitations set forth under the Commission Regulation (EC) No 2273/2003 of 22 December 2003 as regards exemptions for buy-back programmes and stabilisation of financial instruments should be also observed.

What are the characteristics (maximum holdings, voting rights and other rights) of treasury shares?

As a rule, a company's treasury shares cannot exceed ten per cent of its subscribed share capital.

Treasury shares carry no dividend right and voting right is suspended while held by the company.

What are the main reasons to acquire treasury shares?

Apart from the cases of acquiring own shares as a result of a share capital reduction (eg, as a result of the withdrawal of shareholders), companies typically envisage buy-back programmes for the purpose of implementing employee incentive programmes (distributing shares to its employees) or in order to meet obligations arising out of debt obligations exchangeable into equity.

REGULATORY FRAMEWORK

The main piece of legislation governing treatment of treasury shares for both non-listed and listed companies is the Company Law which substantially implements Directive 77/91/EC of 13 December 1976, as amended.

In respect of listed companies, apart from the Company Law the treatment of treasury shares is governed mainly by:

- Capital Markets Law No 297/2004 ('Capital Markets Law') which implements into Romanian law the Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation ('Market Abuse Directive'); and

- Commission Regulation (EC) No 2273/2003 of 22 December 2003 as regards exemptions for buy-back programmes and stabilisation of financial instruments (the 'EU Regulation').

ACQUISITION OF TREASURY SHARES

How can a company acquire treasury shares?

Romanian joint-stock companies may acquire own shares as a result of a share buy-back programme. In case of shares listed on a regulated market the repurchase shall be carried out on the stock market with the observance of price and volume restrictions set forth under the EU Regulation.

Are there any restrictions in acquiring treasury shares? (eg, purpose-wise; accounting-wise?)

Both general restrictions set forth under Company Law as well as specific restrictions applicable to companies listed on regulated markets according to the EU Regulation should be considered.

As a rule, a company is allowed to buy-back its own shares either directly or via a person acting on behalf of the said company, subject to observing a certain number of restrictions set forth under Article 103¹ of the Company Law:

- a) the buy-back is authorised by the extraordinary shareholders meeting which approves the terms of the buy-back (maximum number of shares object of the buy-back; the time period during which they should be acquired and the price interval);
- b) the nominal value of the treasury (own) shares, including the shares that may be already held in treasury by the company, cannot exceed ten per cent of the subscribed share capital;
- c) the payment of the shares shall be performed from the distributable profit or from the available reserves, except for the legal reserves according to the last approved financial statements;
- d) the buy-back programme can have as object only fully paid in shares.

Pursuant to the Company Law, in case the shares will be acquired to be distributed to the employees, the shares shall be distributed within 12 months from their acquisition date.

The Company Law sets forth certain exemptions to the restrictions presented above as per Article 103¹ of Company Law including the cases when shares are acquired:

- following a decision of the company to reduce its share capital;
- as a result of a universal succession by operation of law (*transfer cu titlu universal*);
- as a result of a court decision in a forced execution procedure against a shareholder, debtor to the company;
- acquisition for no consideration of fully paid in shares.

In addition to the above restrictions, in case of repurchase of shares traded on a regulated market, the volume and price restrictions provided under the EU Regulation are also applicable.

Therefore, according to the EU regulation in so far as prices are concerned, the Company must not, when executing trades under a buy-back programme, purchase shares at a price higher than the higher of the prices of the last independent trade and the highest current independent bid on the trading venues where the purchase is carried out.

In addition to the aggregate volume limits requirements set forth under the Companies Law, according to the EU Regulation, in so far as volume is concerned, the company must not purchase more than 25 per cent of the average daily volume of the shares in any one day on the regulated market on which the purchase is carried out.

The average daily volume figure must be based on the average daily volume traded in the month preceding the month of public disclosure of that programme and fixed on that basis for the authorised period of the programme.

Where the programme makes no reference to that volume, the average daily volume figure must be based on the average daily volume traded in the 20 trading days preceding the date of purchase.

In cases of extreme low liquidity on the relevant market, the company may exceed the 25 per cent limit, subject to observance of the conditions set forth in the EU Regulation.

Pursuant to the EU Regulation a company is entitled to buy-back its own shares only for the following objectives:

- a) to reduce the capital of an issuer (in value or in number of shares); or
- b) to meet obligations arising from any of the following: (i) debt financial instruments exchangeable into equity instruments; (ii) employee share option programmes or other allocations of shares to employees of the issuer or of an associate company.

Which authorisation is needed?

As a rule, decision of the extraordinary general meeting of shareholders is required to approve the terms of the buy-back programme (eg, (i) the maximum number of shares to be acquired, (ii) the duration of the buy-back process which cannot be longer than 18 months from the date of publishing the decision in the *Official Gazette* and (iii) the minimum and maximum price of the buy-back.)

For the extraordinary general meeting of shareholders the quorum requirement is at least a quarter of the total number of voting rights for the first call and at least one fifth of the total number of voting rights for the following calls; decision are taken with the majority of votes, subject to more restrictive provisions that may be set forth in the constitutive act.

What are the publicity requirements in the event of acquisition of treasury shares?

The decisions of the extraordinary general meeting of shareholders must be filed with the Trade Registry and published in the *Official Gazette (Monitorul Oficial)*. Also, any changes in the shareholding of a company are evidenced in its shareholders' register and in the Trade Registry.

Listed companies are required to publish the convening notice, the shareholder's resolution in periodic reports transmitted to the stock exchange and the National Securities Commission.

According to the EU Regulation, the company must:

- have in place the mechanisms ensuring that it fulfils trade reporting obligations to the competent authority (National Securities Commission) and the regulated market on which the shares have been admitted to trading (Bucharest Stock Exchange).
- publicly disclose details of all transactions no later than the end of the seventh daily market session following the date of execution of such transactions. Those details must include the objective of the programme, the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorisation for the programme has been given. Subsequent changes to the programme should be subject to adequate public disclosure.

Put and call options – do they count as acquisition of own shares?

While there are no express regulations related to granting put/call options, to the extent to which such options would result in buy-back operations, they should be subject to the same restrictions applicable to buy back programmes provided above.

UTILISATION OF TREASURY SHARES

Are there any statutory obligations to resell or redeem treasury shares?

In case the company observes the volume and time limitations imposed by Company Law there is no statutory obligation to resell or redeem the treasury shares.

If treasury shares are acquired in breach of the restrictions provided by Company Law, the company must re-sell them either, within one year as of the acquisition or within three years as of their acquisition (in case of breach of the ten per cent threshold of treasury shares referred to above).

Failure to resell them within this term triggers the obligation to cancel the shares and reduce its share capital.

How are treasury shares redeemed?

Depending on whether the shares are listed or not on the stock exchange, the sale of shares can be effected: on the stock market; or by way of negotiation and conclusion of a share purchase agreement with an individual shareholder (over the counter; negotiated purchase).

As mentioned above, the decision of the extraordinary general meeting of shareholders is required, if no exemption is applicable (eg, redemption of shares as a result of the share capital reduction).

The principle of equal treatment of shareholders set forth under the Capital Markets Law should be observed.

SALE OF TREASURY SHARES

How can the company sell treasury shares?

As a rule, in case of companies listed on the stock market, the re-sale must be made on such regulated market. Ordinary companies (non-listed) may re-sell their shares by negotiation and conclusion of share purchase agreements.

Are there any restrictions for selling treasury shares?

Timing restrictions would be applicable in case the selling measure is undertaken as a sanction for failure to observe buy back restrictions applicable under Company Law (ie, the treasury shares must be sold within one year or three years as of acquisition, depending on the case).

Furthermore, selling restrictions during the period of the buy-back programme set forth under the EU Regulation are also applicable in case of companies listed on the regulated market.

Which authorisation is needed for selling treasury shares?

As a rule, the selling of treasury shares may be carried out on the basis of a board of director's decision, subject to more strict provisions in the company's constitutive act.

Can treasury shares be sold other than via the stock exchange or by public tender offer?

In principle, as is the case for the repurchase of shares, the re-sale of treasury shares owned by listed companies should be made on the stock market in case no exemption is applicable.

By way of exemption, this rule does not apply in case the company transfers the treasury shares to its employees or if the treasury shares are acquired as a result of the withdrawal of the shareholders from the company, in which cases the transfer of shares may be done directly and not via the stock exchange.

What are the publicity requirements in the event of a sale of treasury shares?

As the sale results in a change in the shareholding of the company, the transfer of the shares and the new shareholding shall be evidenced in the company's shareholders' register and in the Trade Registry.

Pursuant to Article 105¹ of the Company Law, the board of directors must include in the report attached to the annual financial statements the following information regarding the acquisition or sale by the Company of treasury shares:

- a) the reasons for acquiring treasury shares during the fiscal year;
- b) the number and nominal value of the acquired and sold treasury shares during the fiscal year and the percentage of the subscribed share capital representing own shares;
- c) the price paid for acquiring/selling treasury shares;
- d) number and nominal value of all of the treasury shares acquired and held by the company and the percentage of the share capital representing treasury shares.

The company must send the annual financial statements together with the report of the board of directors for submission to the Ministry of Finance, which shall in its turn send them to the Trade Registry.

In case of listed companies, the management report should be included in the annual report which is submitted for publication to the stock market and to the National Securities Commission.

What legal restrictions are there in order to avoid market abuse?

The purchase and sale of treasury shares are not per se exempt from the prohibition of insider dealing and market manipulation (market abuse).

The EU Regulation which is applicable for companies traded on a regulated market provides a safe harbour meaning that the prohibitions set out in the Market Abuse Directive shall not apply to trading its own shares in buy-back programmes if carried out in accordance with the EU Regulation.

Furthermore, the Capital Markets Law provides that prohibitions related to market abuse shall not apply to buy back programmes which have as objective the stabilisation of a financial instrument and which are carried out with the observance of the National Securities Commission regulations.

TREASURY SHARES AND TAKEOVER LAW

What are the general implications of treasury shares under the applicable takeover law regime?

According to the Capital Market Law, a person who, due to its purchases or to those of the persons with whom it acts in concert, holds more than 33 per cent of the voting shares in a company is obliged to launch a public offer addressed to all holders of securities and covering all their holdings as soon as possible but no later than two months after having attained the shareholdings limit specified above.

Considering the fact that according to the Company Law, in case of treasury shares the voting right is suspended, acquisition of treasury shares would impact on the voting rights of all shareholders and shareholders must be aware of reaching the 33 per cent mandatory takeover threshold as a result of a buy-back programme.

The mandatory takeover requirement (applicable for holdings of a shareholder exceeding 33 per cent of the voting rights in a company) is not applicable in case such holding was reached un-intentionally. Acquiring a position representing more than 33 per cent of the voting rights over the company is considered unintentional, if it has been attained as a result of operations such as capital decrease, through redemption by the company of its own shares, followed by the cancellation of such shares.

However, in such circumstance the shareholder acquiring more than 33 per cent of the voting rights has the following alternatives: (i) carry out a public offering or (ii) sell shares in order to fall below the 33 per cent threshold.

Treasury Shares as defence measures?

Acquisition of treasury shares may be seen as a potential defence measure in case of a hostile takeover, in consideration of the fact that the non-voting treasury shares will increase the voting power of the controlling shareholder, but there is no relevant practice on the market to support the feasibility of this measure. At the same time, it should be considered that due to the non-voting nature of treasury shares, in the event of a successful takeover, the bidder could have a relatively increased voting power.